Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

UNITED HOSPITAL CENTER *et al.*,

Petitioners,

v.

DANIEL GUIDA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of West Virginia

PETITION FOR A WRIT OF CERTIORARI

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
MICHAEL D. HATCHER
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment prohibits state courts from allowing a class representative to sue private parties that are not alleged to have caused the named plaintiff any injury whatsoever.

PARTIES TO THE PROCEEDING

The parties to the proceeding are the 54 defendants listed immediately below who are petitioning this Court ("Petitioners"), 14 other defendants listed below who have not joined this Petition, and Respondent.

The Petitioners are: Appalachian Regional Healthcare, Inc. d/b/a Beckley Appalachian Regional Hospital, Appalachian Regional Healthcare, Inc. d/b/a Man Appalachian Regional Healthcare Hospital, Boone Memorial Hospital, Braxton County Memorial Hospital, Inc., Broaddus Hospital, Cabell Huntington Hospital, Camden-Clark Memorial Hospital Corporation, Charleston Area Medical Center, ChartOne, Inc., City Hospital, Inc., Community Health Assoc. d/b/a Jackson General Hospital, Davis Memorial Hospital, Eye and Ear Clinic of Charleston, Fairmont General Hospital, Inc., Grafton City Hospital, Grant Memorial Hospital Trust Foundation, Inc., Greenbrier Valley Medical Corp./Triad, Herbert J. Thomas Memorial Hospital, Highland Hospital Foundation, Inc., Jefferson Memorial Hospital, Medcor, Inc., Minnie Hamilton Health Care Center, Inc, Monongalia County General Hospital Company, Montgomery General Hospital, Morgan County War Memorial Hospital, Ohio Valley Medical Center, Plateau Medical Center, Inc., Pocahontas Memorial Hospital, Preston Memorial Hospital, Princeton Community Hospital Assoc., Putnam General Hospital, Raleigh General Hospital, Rebound Inc., Rehabilitation Hospital Corporation of America, Rehabilitation Hospital Corporation of America, d/b/a Healthsouth Western Hills, Rehabilitation Hospital Corporation of America, d/b/a Healthsouth Southern Hills, Reynolds Memorial Hospital, Smart Document Solutions, LLC (formerly known as Smart Professional Photocopy Corporation), Saint Francis Hospital, St. Luke's Princeton LLC d/b/a St. Lukes Hospital, St. Joseph's Hospital, St. Joseph's Hospital of Buckhannon, Inc., St. Mary's Hospital of

Huntington, Inc., Stonewall Jackson Memorial Hospital Co., Summers County Appalachian Regional Hospital, Summersville Memorial Hospital Comm., Tri-City Health Services, Inc. d/b/a HCA Columbia River Park Hospital, United Hospital Center, Inc., Webster County Memorial Hospital, Inc., West Virginia Rehabilitation Hospital, Inc., d/b/a Healthsouth Mountain View, West Virginia University Medical Corporation, Inc., West Virginia University Hospitals, Inc., Wetzel County Hospital, and Wheeling Hospital, Inc.

The defendants who are not petitioning the Court are: EHI Tri-Star, Inc., Hampshire Memorial Hospital, Inc., Health Management Assoc. d/b/a Williamson Memorial Hospital, Information Professionals, Mildred Mitchell-Bateman Hospital Aux., Inc., Pleasant Valley Hospital, Inc., Potomac Valley Hospital of W.Va., Inc., Psychiatric Institute of West Virginia, Inc. d/b/a Chestnut Ridge Psychiatric Hospital, Recordex Acquisition Corp., Richwood Area Community Hospital, Inc., Roane General Hospital Foundation, Inc., Sistersville General Hospital, Inc., Weirton Medical Center, Inc., and West Virginia Rehabilitation Hospital, Inc.

Petitioners Boone Memorial Hospital, Grafton City Hospital, Grant Memorial Hospital Trust Foundation, Inc., Morgan County War Memorial Hospital, Stonewall Jackson Memorial Hospital Co., Summersville Memorial Hospital Comm., Wheeling Hospital, Inc., Wetzel County Hospital, and Webster County Memorial Hospital, Inc. are not non-governmental corporations.

Petitioners Appalachian Regional Healthcare, Inc. d/b/a Beckley Appalachian Regional Hospital, Appalachian Regional Healthcare, Inc. d/b/a Man Appalachian Regional Healthcare Hospital, City Hospital, Inc., Fairmont General Hospital, Inc., Highland Hospital Foundation, Inc., Man Appalachian Regional Hospital, Minnie Hamilton Health Care Center, Inc, Pocahontas Memorial Hospital, Smart Document Solutions, LLC (formerly known as Smart

Professional Photocopy Corporation), St. Luke's Princeton LLC d/b/a St. Lukes Hospital, St. Joseph's Hospital of Buckhannon, Inc., Summers County Appalachian Regional Hospital, United Hospital Center, Inc., West Virginia University Medical Corporation, Inc., and West Virginia University Hospitals, Inc. are non-governmental corporations with no parent companies. No publicly-traded corporation owns 10% or more of any of these petitioners.

Petitioner Camden-Clark Memorial Hospital Corporation is a non-governmental corporation with parent company Camden-Clark Health Services, Inc. No publicly traded corporation owns 10% or more of this petitioner.

Petitioner ChartOne, Inc. is a non-governmental corporation with no parent company. Prudential Financial, Inc. owns 10% or more of this petitioner.

Petitioner Medcor, Inc. (now known as ROCMed, Inc.) is a non-governmental corporation with parent company MCMH, Inc. No publicly traded corporation owns 10% or more of this petitioner.

Petitioner Monongalia County General Hospital Company is a non-governmental corporation with parent company Monongalia Health System, Inc. No publicly traded corporation owns 10% or more of this petitioner.

Petitioner Ohio Valley Medical Center is a non-governmental corporation with parent company Ohio Valley Health Services and Education Corp. No publicly traded corporation owns 10% or more of this petitioner.

Petitioner Reynolds Memorial Hospital is a non-governmental corporation with parent company Reynolds Memorial Healthcare System, Inc. No publicly traded corporation owns 10% or more of this petitioner.

Petitioner Herbert J. Thomas Memorial Hospital is a non-governmental corporation with parent company Herbert J.

Thomas Memorial Hospital Association. No publicly traded corporation owns 10% or more of this petitioner.

Petitioner Putnam General Hospital is a non-governmental corporation with parent company Teays Valley Health Services, Inc., which is owned by Hospital Corp., LLC, whose sole member is Healthtrust, Inc. - The Hospital Company, which is owned by HCA (no comma) Inc. No publicly-traded corporation besides HCA Inc. owns 10% or more of this petitioner.

Petitioner Raleigh General Hospital is a non-governmental corporation with parent company Teays Valley Health Services, Inc., which is owned by Hospital Corp., LLC, whose sole member is Healthtrust, Inc. - The Hospital Company, which is owned by HCA (no comma) Inc. No publicly-traded corporation besides HCA Inc. owns 10% or more of this petitioner.

Petitioner Saint Francis Hospital is a non-governmental corporation with parent company Charleston Hospital, Inc., which is owned by Galen of West Virginia, Inc., which is owned by Galen Holdco, LLC, whose sole member is Healthtrust, Inc. - The Hospital Company, which is owned by HCA Inc. No publicly-traded corporation besides HCA Inc. owns 10% or more this petitioner.

Petitioner St. Joseph's Hospital is a non-governmental corporation with parent company Columbia-St. Joseph's Healthcare System, Limited, whose general partner is Columbia Parkersburg Healthcare System, Inc., which is owned by Galen Holdco, LLC, whose sole member is Healthtrust, Inc. - The Hospital Company, which is owned by HCA Inc. No publicly-traded corporation besides HCA Inc. owns 10% or more of this petitioner.

Petitioner Tri-City Health Services, Inc. d/b/a HCA Columbia River Park Hospital is a non-governmental corporation with parent company Tri-Cities Health Services, Corp., which is owned by HCA Psychiatric Company., which

is owned by Hospital Corp LLC, whose sole member is Healthtrust, Inc. - The Hospital Company, which is owned by HCA Inc. No publicly-traded corporation besides HCA Inc. owns 10% or more of this petitioner.

Petitioners Rebound Inc., Rehabilitation Hospital Corporation of America, and West Virginia Rehabilitation Hospital, Inc. are all non-governmental corporations whose ultimate parent corporation is Healthsouth Corp. FMR Corp., as parent company of various Fidelity mutual funds, reported as of December 31, 2001, that various Fidelity mutual funds beneficially owned more than 10% of Healthsouth Corp.'s common stock. Healthsouth Corp. is unaware of the current holdings of FMR Corp. and its affiliates. Healthsouth Corp. has not received notice of any other holders of more than 10% of Healthsouth Corp.'s common stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, 51 West Virginia hospitals and 3 copy companies, respectfully petition for a writ of certiorari to review the judgment of the West Virginia Supreme Court.

OPINIONS BELOW

The order of the Circuit Court of Brooke County, West Virginia certifying a class of plaintiffs (App. 3a-13a) was issued on May 22, 2002, and is unpublished. The first order of the circuit court denying petitioners' motion to dismiss (App. 18a-20a) was issued on September 28, 2001, and is unpublished. The final order of the circuit court denying petitioners' motion to dismiss (App. 14a-17a) was issued on March 18, 2002, and is unpublished. The order of the West Virginia Supreme Court denying petitioners' petition for a writ of prohibition (App. 1a-2a) was issued on July 2, 2002, and is unpublished.

JURISDICTION

The order and final judgment of the West Virginia Supreme Court was entered on July 2, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 479-83 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision at issue in this case is the Due Process Clause of the Fourteenth Amendment to the United States Constitution: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The statutes at issue in this case are W. Va. Code §§ 16-29-1 & 16-29-2 (2002), which are reproduced at App. 21a-23a.

STATEMENT OF THE CASE

In this class action lawsuit, the West Virginia courts sanctioned a departure from the fundamental rule, deeply rooted in Anglo-American jurisprudence, that a private party may not be haled into court and forced to bear the expense and burdens of litigation unless that party is alleged to have injured the plaintiff. Respondent is an attorney who requested his client's medical records from a hospital in West Virginia. Alleging that this one hospital had overcharged him for records in violation of a state statute, respondent sued, on behalf of himself and all other "similarly situated" persons, virtually every hospital in the State, as well as virtually every copy company used by any West Virginia hospital to process medical records requests. In the decision below, the West Virginia Supreme Court upheld an order that permits respondent to maintain a plaintiff class action against all 68 defendants named in his amended complaint, despite his failure to allege that he has ever had any dealings with, or suffered any injury at the hands of, 67 of these defendants.[1] The state courts permitted respondent to maintain this action on the theory that all of the defendants are "juridically linked" because all of them are hospitals subject to the same state regulatory scheme, or are agents of such hospitals. The lower courts' wildly erroneous decision thus presents the question whether the Due Process Clause of the Fourteenth Amendment prohibits state courts from allowing a class representative to sue, in an effort to recover monetary damages on behalf of a class, private parties that are not alleged to have caused the plaintiff any injury whatsoever.

I. FACTUAL BACKGROUND

This suit arises under the West Virginia Medical Records Statute, W. Va. Code §§ 16-29-1 and 16-29-2 (2002), which

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[1] Petitioners are a subset of these 67 entities. In the proceedings below, the 67 entities were identified as the "Additional Defendants."

regulates a hospital's provision of medical records to its patients. Section 16-29-1 requires hospitals to, "upon the written request of a patient, his authorized agent or authorized representative, within a reasonable time, furnish a copy, as requested, of all or a portion of the patient's record to the patient, his authorized agent or authorized representative." *Id.* § 16-29-1 (2002). Section 16-29-2 regulates what hospitals can charge for the copies:

> The provider shall be reimbursed by the person requesting in writing a copy of the records at the time of delivery for all reasonable expenses incurred in complying with this article: Provided, That, the cost may not exceed seventy-five cents per page for the copying of any record or records which have already been reduced to written form and a search fee may not exceed ten dollars.

Id. § 16-29-2(a) (2002).

Respondent Daniel Guida is an attorney who requested medical records from Weirton Medical Center ("WMC") on behalf of one of his clients. At the time Respondent requested the medical records, WMC had a preexisting contract with Recordex – a copy company – pursuant to which Recordex copied the requested records and released the copies to Respondent. Recordex charged Respondent 75 cents per page, plus a ten dollar search fee, for the copies.[2]

II. PROCEDURAL BACKGROUND

A. Parties And Causes Of Action

Respondent filed a class action complaint in the Circuit Court of Brooke County, West Virginia on behalf of himself "and all similarly situated individuals" against 62 hospitals

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[2] As part of the discovery that has taken place in this case, it has come to light that respondent also requested documents from Wheeling Hospital.

and 6 copy companies. Respondent alleges in his Amended Complaint that he requested medical records from WMC and was charged a fee in excess of that allowed by Section 16-29-2. Respondent's Amended Complaint asserts five causes of action: (1) violation of Section 16-29-2, (2) civil conspiracy and restraint of trade, (3) violation of the Consumer Credit and Protection Act, (4) unjust enrichment, and (5) punitive damages. Respondent seeks unspecified monetary damages for these alleged violations. Respondent's Amended Complaint does not allege that Respondent requested medical records from, or had any other dealings with, any defendant other than WMC.[3]

B. The Motion To Dismiss And Class Certification

A subset of the Additional Defendants filed a motion to dismiss the Amended Complaint in which they argued, among other things, that maintenance of this class action would violate the Due Process Clause of the Fourteenth Amendment because Respondent lacked standing to sue the defendants that were not alleged to have caused him any injury. The same argument was made in opposition to class certification.

Initially, the Circuit Court allowed unrestricted discovery. After denying the motion to dismiss without prejudice, however, the Circuit Court limited discovery to issues related to the motion to dismiss and Respondent's class certification motion. (App. 19a-20a.) And, when the Circuit Court finally denied the motion to dismiss, the court further limited discovery to the issues of standing, jurisdiction, and class certification. (*Id.* at 17a.) In all, the Circuit Court permitted discovery to continue for roughly a year before finally ruling on class certification.

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[3] Respondent has never amended his complaint to include any allegations concerning any dealings with Wheeling Hospital.

The Circuit Court certified one class of plaintiffs, with two subclasses. (App. 11a-12a.) The following class was certified:

> "All patients, authorized agents of patients, and authorized representatives of patients of any health care provider in West Virginia who have made requests of such health care provider for medical records pursuant to the provision of *W.Va.Code*, 16-29-1, since March 2, 1996 and, in response to said requests, were assessed charges by any defendant health care provider or any defendant copy company."

(*Id.* at 11a.) The two subclasses are based upon the means by which the defendants provided copies. Subclass "A" consists of class members who were "assessed charges by a copy company named as a defendant in this action." (*Id.* at 12a.) Subclass "B" consists of class members who were "assessed charges by any health care provider named as a defendant in this action." (*Id.*)

In concluding that plaintiff could maintain an action against a set of defendants that includes 65 entities with whom he has never dealt, and 67 entities that he has never alleged caused him any legally cognizable injury, the Circuit Court relied on the so-called "juridical links" exception to the "typicality" requirement that West Virginia, like Federal Rule of Civil Procedure 23, imposes on class actions.[4] The Circuit Court reasoned that all of the defendants were "juridically linked" because:

> the challenged conduct of all defendants in the action *sub judice* arises directly out of their status as licensed, certified or registered health care providers in West

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[4] In 1998, the West Virginia Supreme Court adopted *West Virginia Rules of Civil Procedure* Rule 23, which is "essentially identical to the federal rule and the rule in most states." *State ex rel. Erie Fire Ins. Co.* v. *Madden*, 515 S.E.2d 351, 354 n.5 (W. Va. 1998).

> Virginia or their agency relationship with licensed, certified or registered health care providers in West Virginia and their unique duty to furnish medical records in accordance with the terms of the statutes which are the subject of this action.

(App. 10a.) The Circuit Court also predicated its finding of "juridical links" on respondent's bald allegation of a civil conspiracy. (*Id.* at 9a.)

C. West Virginia Supreme Court Opinion

Petitioners thereafter sought a Writ of Prohibition from the West Virginia Supreme Court (1) preventing the Circuit Court from proceeding with this action against the defendants who are not alleged to have injured respondent and (2) issuing a rule compelling the Circuit Court and Respondent to show cause why the orders denying the motion to dismiss and certifying the class should not be set aside. One of the grounds asserted in the Petition for Writ of Prohibition was that allowing respondent to maintain this class action violated the Federal due process rights of the defendants who are not alleged to have caused respondent any injury. (Pet. for Writ of Prohibition at 9-10, 15-16.)

The West Virginia Supreme Court summarily denied the Petition for a Writ of Prohibition. (App. 2a.) Two Justices dissented without opinion. (*Id.*)

REASONS FOR GRANTING THE PETITION

By allowing a representative plaintiff to use the procedural device of a class action to sue literally dozens of entities that have never dealt with that plaintiff and that are not alleged to have caused him any injury, the West Virginia courts transgressed the fundamental and long-standing rule that a private defendant may only be haled into court at the behest of a private plaintiff who alleges a legally cognizable injury *caused by that defendant*. This rule, deeply rooted in Anglo-

American jurisprudence, is an essential attribute of the "'orderly administration of the laws'" that gives our Nation's legal system the "degree of predictability" necessary to ensure "'fair play and substantial justice.'" *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292, 297 (1980). This fundamental principle cannot be overridden by considerations of judicial efficiency, or by the West Virginia Supreme Court's avowed desire to ensure that the "'slippery doctrine of standing is not . . . employed to avoid a frontal confrontation with an issue of legitimate public concern.'" *State ex rel. Erie Fire Ins. Co.* v. *Madden*, 515 S.E.2d 351, 355 n.6 (W. Va. 1998). By misapplying the "juridical links" doctrine, moreover, the West Virginia courts have deepened a conflict between the majority of state and federal courts, which do not permit plaintiffs to sue private defendants who are not alleged to have caused the plaintiffs any injury, and the small handful of State courts that have recently begun to permit plaintiffs to maintain such suits. Accordingly, this Court should review the decision below.

I. THE DUE PROCESS CLAUSE PROHIBITS STATES FROM PERMITTING A NAMED REPRESENTATIVE PLAINTIFF TO SUE PRIVATE PARTIES WHO HAVE NEVER DEALT WITH OR CAUSED ANY ALLEGED INJURY TO THAT PLAINTIFF.

Under the Due Process Clause, state courts must respect those "'principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.'" *Cooper* v. *Oklahoma*, 517 U.S. 348, 355 (1996) (quoting *Medina* v. *California*, 505 U.S. 437, 445 (1992)). Thus, state courts must provide a "neutral and detached judge in the first instance," *Ward* v. *Village of Monroeville, Ohio*, 409 U.S. 57, 61-62 (1972), and may not permit plaintiffs to hale into court a defendant who lacks minimum contacts with the State. *World-Wide Volkswagen Corp.*, 444 U.S. at 297. Permitting a class plaintiff to bring a damages action against entities that

have never dealt with the plaintiff and are not alleged to have caused the plaintiff any cognizable injury transgresses the fundamental principle that a private defendant cannot be haled into court by a private plaintiff who alleges no injury traceable to that defendant.

Although in the federal system the requirement of standing embedded in Article III has long been understood as a requirement "founded in concern about the proper – and properly limited – role of the courts in a democratic society," *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975), the rule that a private plaintiff can seek damages only from those private persons or entities who are alleged to have injured the plaintiff protects the same interests in fundamental fairness and substantial justice that led to adoption of the "minimum contacts" personal jurisdiction test a half a century ago. In elaborating upon the requirements of "'fair play and substantial justice,'" *World-Wide Volkswagen Corp.*, 444 U.S. at 292, that underlie that test, this Court stressed that what is:

> critical to the due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. . . . The Due Process Clause, by ensuring the "orderly administration of the laws," . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

Id. at 297.

That same analysis demonstrates the fundamental unfairness and unpredictability of a legal system that permits a private defendant to be haled into court and forced to bear the expenses and burdens of litigation at the behest of a plaintiff who can allege no injury at the hands of the defendant. An entity that has no dealings with a particular

individual cannot "reasonably anticipate being haled into court" by such an individual. More fundamentally, private parties cannot be expected to structure their primary conduct with respect to individuals with whom they never deal. To take the most basic of examples, a hospital seeking to insure against potential liabilities has no reason to seek insurance coverage for claims asserted by persons to whom the hospital owes no duties, and with whom the hospital has never dealt.

Indeed, this lawsuit provides a number of illustrations of the unfairness of permitting private defendants to be sued by plaintiffs who have never dealt with the defendants, and who allege no injury traceable to them. Petitioners have adopted widely differing practices for charging for copies of their patients' medical records. Petitioner Webster Memorial, for example, never charges any patient (or any physicians, hospitals or clinics requesting records on behalf of a patient) for searching for or copying medical records; it does charge insurance companies and attorneys $.75 per page, and charges a flat $10 fee for persons seeking records for disability determinations, though it waives that fee for indigent patients. Thus, Webster Memorial has no reason to fear liability for overcharging any of its patients (other than non-indigent applicants for disability) and has no reason to maintain records relating to record requests by such individuals or otherwise to conduct its affairs with an eye towards defending against overcharge claims by such individuals.

Similarly, although Webster Memorial might anticipate being sued by an attorney or insurance company, it would likely have dispositive defenses against any claims asserted by these commercial actors that it could assert after only limited discovery, such as a claim that the plaintiff suffered no injury, and is not the real party in interest, because it merely passed the costs on as part of its service. A hospital that is forced to defend itself against claims brought by an individual with whom the hospital has never dealt, however, loses the ability to raise such a dispositive defense in the early

stages of litigation, and thus remains trapped in a lawsuit that it should be able to end quickly and with little expense. This unfair ability to hold numerous defendants hostage without any allegation that they caused the representative plaintiff any injury provides class plaintiffs with significant, and entirely improper, leverage that they can use to extract a favorable settlement, and thereby escape the need to ever allege, let alone prove, injury at the hands of all defendants. Thus, as Webster Memorial's situation illustrates, permitting a plaintiff to sue multiple defendants who are not alleged to have caused that plaintiff any injury only heightens the due process problems that courts have recognized in the analogous situation of suits against a certified class of defendants. See *Ackerman* v. *Oryx Communications, Inc.*, 609 F. Supp. 363, 374 (S.D.N.Y. 1984) ("creation of defendant classes raises due process issues"), *aff'd and remanded*, 810 F.2d 336 (2d Cir. 1987); *Angel Music, Inc.* v. *ABC Sports, Inc.*, 112 F.R.D. 70, 77 (S.D.N.Y. 1986) (noting "the due process concerns latent in defendant class certifications"); *Marchwinski* v. *Oliver Tyrone Corp.*, 81 F.R.D. 487, 489 (W.D. Pa. 1979) ("the very notion of a defendant class raises immediate due process concerns").

The principle that it is unfair to allow a private party to be sued by someone with whom it has never dealt and whom it has never injured is so fundamental to our Nation's legal traditions and history that it is expressly embodied in the "case or controversy" requirement of Article III of the federal constitution, and has been embraced by many state courts, which conform the scope of their judicial function to the Article III model.[5] Cf. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994) (noting that certain due process principles,

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[5] See H. Hershkoff, *State Courts and the 'Passive Virtues': Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1838 (2001) (exhaustively reviewing state court justiciability doctrines and noting: "Many state courts do conform the scope of their judicial function to the Article III model.") (hereinafter "*State Courts*").

such as the prohibition on retroactive legislation, are embodied in express provisions of the Constitution, such as the Takings, Contracts and Ex Post Facto Clauses). As this Court has repeatedly explained, to establish "standing" under Art. III's "case or controversy" requirement, a plaintiff must establish a "'fairly . . . trace[able]' connection between the alleged injury in fact and the alleged conduct of the defendant." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (alteration in original) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976)).

In restricting the judicial power to cases in which a plaintiff sues only those private persons whose conduct caused the injury for which redress is sought, the Framers did not introduce an innovation to the American judicial system. Rather, this restriction reflects a longstanding Anglo-American judicial tradition that pre-dates the federal constitution itself. This Court has explained that Article III's case or controversy requirement "is properly understood to mean 'cases or controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Id.* at 774 (quoting *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 102 (1998)). Thus, in endowing courts with "judicial power":

> the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges. . . . Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the

> expert feel of lawyers constituted "Cases" or "Controversies."

Coleman v. *Miller*, 307 U.S. 433, 460 (1939) (Opinion of Frankfurter, J.). In the case of purely private litigants, the "traditional concerns" of the English courts were actions brought by "individuals who had suffered injury." *Vermont Agency of Natural Res.*, 529 U.S. at 774. Indeed, the scholarly literature describes this "historic form" as "ordinary common law litigation: a concrete dispute that arises between adverse litigants . . . involving the invasion of private rights cognizable at common law." *State Courts, supra*, at 1877-78 (citations and internal quotation marks omitted); see also A. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 882 (1983) (cases seeking to remedy invasions of common law interests provide "an accurate description of the sort of business courts had traditionally entertained").[6]

Moreover, even as they developed various procedural devices to provide more complete relief, courts on both sides of the Atlantic respected the fundamental principle that a plaintiff can sue only those private persons or entities who are

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[6] In concluding that a *qui tam* relator has standing to sue to recover damages suffered by the United States itself, this Court noted that English courts and early American courts entertained claims under statutes that entitled "informers" to recover a portion of a statutorily prescribed penalty as a bounty. *Vermont Agency of Natural Res.*, 529 U.S. at 775-77. In addition, some scholars have argued that the courts at Westminster also heard actions against *public officials* in which plaintiffs who alleged no injury at the hands of the officials sought either to restrain conduct in excess of the officials' authority, or to compel performance of the officials' public duty. *See* R. Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement*, 78 Yale L.J. 816 (1969) (hereinafter "*Public Actions*"). Respondent's claim for damages under the West Virginia Medical Records Act, however, does not remotely resemble either of the two types of historical actions in which English or American courts permitted plaintiffs to sue defendants who had not actually injured them.

alleged to have injured him. As far back as 1199, medieval group litigations, which were the first reported precursors to modern class actions, were universally limited to actions by plaintiffs who could allege that they had been injured by each and every defendant. See, *e.g.*, *Martin, Rector of Barkway* v. *Parishioners of Nuthamstead* [ca. 1199], *available in Select Cases from the Ecclestical Courts of the Province of Canterbury, c. 1200-1301*, 95 Sel. Soc. 8 (N. Adams & C. Donahue eds., 1985). See generally S. Yeazell, *From Medieval Group Litigation to the Modern Class Action* 1-159 (1987) (hereinafter "*Medieval Group Litigation*") (discussing various medieval cases, including *Martin*). Indeed, in the 17th century decision of *Brown* v. *Vermuden*, 22 Eng. Rep. 796, 802 (Ch. 1676), which is generally recognized as the "first" class action, see R. Marcin, *Searching for the Origin of the Class Action*, 23 Cath. U. L. Rev. 515, 516 n.2 (1974), the court permitted a plaintiff to bind absent defendants to a prior judgment where the plaintiff, a clergyman, had alleged and proved that all of the defendant miners owed him tithes, *id.* at 515-16. And in the 19th century, English courts developed the "bill of peace," which permitted a form of defendant class action against voluntary unincorporated associations, such as joint stock companies or friendly societies, that were brought by association members to recover funds or property wrongfully appropriated and then to dissolve the association or provide an accounting and distribution. See H. Downs, *Federal Class Actions: Due Process By Adequacy Of Representation (Identity Of Claims) And The Impact Of General Telephone* v. *Falcon*, 50 Ohio St. L.J. 607, 615 (1993). As described in the historical literature, such actions always involved a showing by the plaintiff that he had suffered some injury at the hands of each defendant. See generally *id.* at 614-19 (discussing various cases from that time period); *Medieval Group Litigation*, *supra*, at 160-96 (same).

In this country, only a few class actions involving multiple defendants ever reached this Court prior to the adoption of the Federal Rules, and in each the named plaintiffs had standing to sue each defendant. *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921), *overruled on other grounds by Touchy* v. *New York Life Ins. Co.*, 314 U.S. 118 (1941); *Galveston Houston & Henderson R.R.* v. *Cowdrey*, 78 U.S. (11 Wall.) 459, 478-79 (1870); *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288, 302 (1853); *see also Christopher* v. *Brusselback*, 302 U.S. 500, 505 (1938) (refusing to bind petitioners that were absent out-of-state defendants in prior class action adjudication to judgment of prior class action adjudication); Following promulgation of Rule 23, this Court made explicit the requirement that plaintiffs must allege facts to support at least one of their number's standing to sue each defendant on each asserted cause of action. See *O'Shea* v. *Littleton*, 414 U.S. 488, 495-96 (1974); *Blum* v. *Yaretsky*, 457 U.S. 991, 1002 (1982).[7]

To be sure, a few States have eliminated the traditional requirement of personal injury at the hands of a defendant in a few isolated circumstances. Some States, for example, permit members of the executive or legislative branches to obtain the non-binding legal views from the state judiciary. *State Courts*, *supra*, at 1845. Others permit private citizens to litigate questions of public import that affect all citizens

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[7] This Court has affirmed or addressed the merits of three defendant class actions without discussing the fact that the named plaintiffs had suffered no injury at the hands of each named defendant. *Richardson* v. *Ramirez*, 418 U.S. 24 (1974); *Washington* v. *Lee*, 263 F. Supp. 327, 329 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968); *Sims* v. *Frink*, 208 F. Supp. 431, 433 (M.D. Ala. 1962), *aff'd sub nom.* 377 U.S. 533 (1964). Each of these cases, however, involved claims alleging violations of public duties by public officials, and thus were consistent with the types of historical actions in which English or American courts permitted plaintiffs to sue public officials who had not actually injured the plaintiffs. *See Public Actions*, *supra*; *see also infra* at 17 (discussing "juridical links" exception to Rule 23 actions against a class of state officials).

equally, such as the validity of proposed public expenditures or legislative enactments. *Id.* at 1852-59. However, in permitting a private plaintiff to sue a private defendant who has never dealt with the plaintiff and who is not alleged to have caused the plaintiff any injury, West Virginia joins California and Massachusetts as the only other States that, to petitioners' knowledge, have departed from this long-standing principle of Anglo-American jurisprudence.[8]

In short, the requirement that a plaintiff sue only those private parties whose conduct caused the plaintiff's alleged injury is not a unique limitation on the power of federal courts. It is, instead, a bedrock principle of Anglo-American jurisprudence, and an essential attribute of the "'orderly administration of the laws.'" *World-Wide Volkswagen Corp.*, 444 U.S. at 297 (quoting *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945)). Although West Virginia purports to limit the judicial power to "cases" and "controversies," W. Va. Const. art. 8, §§ 3, 6, and the West Virginia courts have recognized that this limitation includes the same standing principles embodied in Article III of the federal constitution, *Snyder* v. *Callaghan*, 284 S.E.2d 241, 248 (W. Va. 1981), the West Virginia Supreme Court has explained that, "'[i]n West Virginia the slippery doctrine of

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[8] *See Weld* v. *Glaxo Wellcome Inc.*, 746 N.E.2d 522, 530-31 (Mass. 2001) (permitting plaintiff to sue, under "juridical links" doctrine, companies with whom he had never dealt); *Stop Youth Addiction, Inc.* v. *Lucky Stores, Inc.*, 950 P.2d 1086, 1090-91 (Cal. 1998) (concluding that Cal. Bus. & Prof. Code § 17204 allows private corporation to bring action on behalf of general public against another private corporation for alleged violation of state unfair competition law). As petitioners explain below, state and federal courts have applied the "juridical links" doctrine to permit suits against defendants who are not alleged to have injured the named plaintiff, but (aside from West Virginia and Massachusetts), these courts have done so only in carefully cabined circumstances that parallel the historical actions by non-injured plaintiffs against public officials, or that involve defendants bound by contracts, such as collective bargaining agreements, to treat all class members alike. *See infra* at 17-18.

standing is not usually employed to avoid a frontal confrontation with an issue of legitimate public concern.'" *Erie Fire Ins.*, 515 S.E.2d at 355 n.6 (quoting *State ex rel. Alsop* v. *McCartney*, 228 S.E.2d 278, 283 (W. Va. 1976)). West Virginia is of course free to dispense with standing requirements, including the requirement of an alleged injury at the hands of the defendant, insofar as it seeks to authorize advisory opinions and judicial determinations concerning the validity of state laws and governmental actions. But by permitting plaintiff to sue 67 hospitals and photocopy companies whose conduct is not alleged to have caused plaintiff any cognizable injury, the courts below violated a deeply rooted principle that gives our Nation's legal system the "degree of predictability" necessary to ensure "fair play and substantial justice." *World-Wide Volkswagen Corp.*, 444 U.S. at 292. Accordingly, the decisions below violated petitioners' right to due process of law.

II. THE LOWER COURTS MISAPPLIED THE "JURIDICAL LINKS" DOCTRINE, WHICH IN ALL EVENTS DOES NOT PERMIT A PLAINTIFF TO SUE PRIVATE PARTIES WHO HAVE NEVER DEALT WITH OR CAUSED ANY ALLEGED INJURY TO THAT PLAINTIFF.

In permitting plaintiff to maintain this action against petitioners, the lower courts relied on the so-called "juridical links" doctrine. The validity of that doctrine, which arose as an exception to the "typicality" requirement of Federal Rule of Civil Procedure 23, has long been questioned as potentially inconsistent with the traditional rule that a plaintiff can sue only those private parties whose conduct has caused the plaintiff an alleged injury. See generally S. Shafner, Note, *The Juridical Links Exception to the Typicality Requirement in Multiple Defendant Class Actions: The Relationship Between Standing and Typicality*, 58 B.U. L. Rev. 492 (1978) (hereinafter "*Juridical Links Note*"). Whatever the validity of this doctrine may be as a general matter, it is clear that the

lower courts' misapplication of the doctrine here violated the Due Process Clause's requirement of "fair play and substantial justice." Indeed, the lower court's misapplication deepened a conflict between the majority of state and federal courts, which do not permit plaintiffs to sue defendants who are not alleged to have caused the plaintiffs any injury, and the small handful of State courts that have recently permitted plaintiffs to maintain such suits. Accordingly, the decision below warrants review for this additional reason as well.

The "juridical links" doctrine is derived from the Ninth Circuit's decision in *La Mar* v. *H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973), a case in which the court reversed a class certification ruling on the ground that a plaintiff who had dealt with a single licensed pawnbroker but sought to sue all pawnbrokers licensed in the State could not satisfy the typicality requirement of Rule 23. *Id.* at 465-66. After dismissing the defendants with whom the named plaintiff had not dealt, the court indicated in dicta that its ruling:

> does not embrace situations in which all injuries are the result of a conspiracy or concerted schemes between the defendants at whose hands the class suffered injury. Nor is it intended to apply in instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious.

Id. at 466 (footnote omitted).

A number of federal and state courts have relied on the "juridical links" exception to permit a plaintiff class to sue a class of defendants in circumstances where there are no named class plaintiffs who can allege injury at the hands of one or more of the defendants. The theory has most typically been applied "when a class of plaintiffs, usually attempting to vindicate their civil rights, brings an action against a class of state officials charged with uniformly enforcing an allegedly

unconstitutional statute or administrative policy." *Angel Music, Inc.*, 112 F.R.D. at 75 (collecting cases); see also *Mudd* v. *Busse*, 68 F.R.D. 522, 528 (N.D. Ind. 1975). It has also been applied in suits against a class of private defendants that are "bound together by adherence to a single document or industry-wide contract which caused them to engage in the challenged practices," such as a defendant class of trucking firms bound by a national master freight agreement or a class of defendant employers bound by a nationwide collective bargaining agreement. *Angel Music, Inc.*, 112 F.R.D. at 76 (citing cases). In both of these categories of cases, the defendants can be viewed as mere extensions of a collective body (*e.g.*, the State legislature, or industry management) whose collective decision has in fact injured the named plaintiff. See *Juridical Links Note*, *supra*, at 512 (suggesting such a rationale for class actions challenging uniform governmental policies); *Akerman*, 609 F. Supp. at 375 ("[p]artnership, joint enterprise, control, conspiracy, and aiding and abetting . . . denote some form of activity or association on the part of the defendants that warrants imposition of joint liability against the group even though the plaintiff may have dealt primarily with a single member").

In this case, however, the lower courts applied the juridical links exception in an expansive – and constitutionally impermissible – manner that extends the doctrine beyond any such theoretical justifications. The Circuit Court found that the defendants were "juridically linked" because the:

> statutory scheme pursuant to which this action is brought gives rise to a cohesiveness, connective link or interrelationship between the defendants and the claims asserted in the Amended Complaint such as to support a finding that the defendants are juridically related in a manner that suggests a single resolution to this dispute is far preferable to a multiplicity of similar actions.

(App. 10a.) Under this sweeping rationale, all entities operating in an industry subject to state or federal regulation

are, by virtue of that fact alone, "juridically linked" and can be sued collectively by any one individual who alleges an injury arising out of a single entity's violation of any industry-wide regulation. Thus, because all hospitals are required by law to be licensed to do business in West Virginia and are governed by the same rules and regulations, they are "juridically linked" under the reasoning of the decisions below whenever any one of them is alleged to have violated a statutory or regulatory requirement.

The lower courts' sweeping application of the juridical links doctrine plainly conflicts with the carefully cabined applications employed in *Angel Music, Inc.*, *Akerman*, and numerous other state as well as federal cases. In fact, at least one state court has rejected a virtually identical class action brought against all hospitals and copy companies in Indiana for alleged violations of that State's medical records statute, reasoning, in direct contrast to the lower courts here, that a plaintiff cannot "'bootstrap' standing by being representative of a class." *McDonald* v. *Smart Prof'l Photocopy Corp.*, No. 84D01 9304 CP 578, slip op. at 2 (Vigo Super. Ct. Ind. Feb. 2, 1994). Similarly, in *Angel Music, Inc.*, the court rejected the plaintiff's claim that a class of television producers, syndicators, and distributors who had never dealt with the plaintiff were juridically linked to a network that had allegedly infringed his copyright by virtue of their common "need to use copyrighted music in television programming, their method of obtaining these compositions . . . and the overarching statutory regulation of this system by the provisions of the Copyright Act." 112 F.R.D. at 72; see also *Streich* v. *American Family Mut. Ins. Co.*, 399 N.W.2d 210, 216 (Minn. Ct. App. 1987) (rejecting claim that all insurance companies were "somehow juridically linked by Minnesota's No-Fault Act and by the complex system of regulations governing insurance operations"). Indeed, in this case, as in *Angel Music, Inc.*, the defendants' conduct was not "standardized by a common link to an agreement, contract or

enforced system which acts to standardize the factual underpinnings of the claims[,] . . . to insure the assertion of defenses common to the class[,] . . . . [and to] mitigate[] the due process concerns latent in defendant class certifications." *Angel Music, Inc.*, 112 F.R.D. at 77. Instead, as noted above, it is undisputed and indisputable that petitioners engage in widely differing practices concerning the charges they assess for medical records, and that those differing practices could give rise to different defenses if the plaintiff class included members who had actually dealt with, and alleged injury at the hands of, each individual defendant. See *supra* at 9.

The lower courts' reliance on plaintiff's bald – and economically nonsensical – allegation of a conspiracy likewise does not bring this case within the recognized ambit of the juridical links doctrine and does not obviate the due process violation that maintenance of this suit against petitioners entails. Federal and state courts have consistently held that the "inclusion of a conclusory averment of conspiracy among defendant[s] . . . does not remedy the plaintiff's lack of standing to sue" defendants with whom the plaintiff did not deal. *Weiner* v. *Bank of King of Prussia*, 358 F. Supp. 684, 693 (E.D. Pa. 1973); see also *Roberts* v. *Heim*, 670 F. Supp. 1466, 1485 (N.D. Cal. 1987) (general allegations of conspiracy insufficient to sustain class action against accountants and others for alleged conspiracy to defraud), *aff'd in part, rev'd in part on other grounds*, 857 F.2d 646 (9th Cir. 1998) (per curiam); *Ramos* v. *Patrician Equities Corp.*, 765 F. Supp. 1196, 1199 (S.D.N.Y. 1991) (brief and general allegation of conspiracy does "not even approach what is required" to establish standing to sustain class action against persons with whom the representative had never dealt); *McDonald*, No. 84D01 9304 CP 578, slip op. at 2 ("bare conclusory allegation . . . of a conspiracy among [defendant hospitals and copy companies] does not relieve the plaintiff from the principle that representative plaintiffs must have individual standing to assert claims against all members

of a[] defendant class"). Indeed, "[i]f a mere allegation of conspiracy were sufficient to confer standing upon a plaintiff to sue large numbers of defendants with whom he has not dealt, the potential for abuse would be enormous." *Juridical Links Note*, *supra*, at 502 n.65.

Here, respondent's allegation of a conspiracy is not only conclusory, it makes no economic sense. Respondent alleges a conspiracy to fix prices for copies of medical records. But hospitals do not compete with each other over the provision of copies of medical records. The goods at issue – individual patient medical records – are not fungible. Each patient's medical records are unique. If one hospital lowers its price for copies of medical records, patients of other hospitals cannot come to that hospital and request their medical records at the lower prices. There is no competition between the hospitals and, thus, no logical reason for the hospitals to conspire to fix the prices they charge for records.

Not surprisingly, therefore, after roughly a year of discovery, respondent adduced no evidence of any actual conspiracy to fix the prices for medical records in West Virginia. See *Ford* v. *NYLCare Health Plans of Gulf Coast, Inc.*, 301 F.3d 329, 332-33 (5th Cir. 2002) (requiring plaintiff, in appeal from denial of class certification, to point to specific evidence to support allegations); cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (at summary judgment stage, plaintiff "must 'set forth' by affidavit or other evidence 'specific facts[]'" demonstrating standing). Instead, the only "support" respondent proffered for his conspiracy claim was deposition testimony from a *different case*, in which an employee of the defendant in that action stated that there was "sort of a consensus" and "sort of a common practice in the industry" to charge $.75 per page and a $10 search fee. (McFadden Dep. at 92-95, in App. to Resp't, Danial J. Guida's Resp. to Hospital's Pet. for Writ of Prohibition.). This is precisely the type of evidence of "common practices" that other courts have rejected as insufficient to sustain a class

action against a group of defendants with whom the named plaintiffs have never dealt. See *Angel Music, Inc.*, 112 F.R.D at 76 & n.4 ("alleged common industry practice of ignoring the need to obtain synchronization rights licenses," based "solely on statements from three ABC employees," insufficient to establish juridical link among class of television producers, syndicators and distributors).

This Court, of course, has plenary authority to oversee the development of the juridical links doctrine by the federal courts, and can ensure that this exception does not contravene either the typicality requirements of Federal Rule of Civil Procedure 23 or Article III standing requirements. In this case, however, only the Due Process Clause can protect private parties from the fundamental unfairness of being haled into state court and forced to defend themselves against damages claims brought by individuals with whom they have never dealt and who can allege no injury at defendants' hands. Aggressive plaintiffs' counsel have proven more than willing to use the juridical links doctrine in state courts throughout the country to bring lawsuits against multiple defendants with whom the named plaintiffs have never dealt, and at whose hands they can claim to have suffered no injury – often on the same flawed, and fundamentally unfair, theory that the defendants are juridically linked by virtue of common regulation. See, *e.g.*, *McDonald*, No. 84D01 9304 CP 578, slip op. at 2 (suit against Indiana health care providers and copy companies, all allegedly linked by medical records statute); *Cruz* v. *All Saints Healthcare Sys., Inc.*, 625 N.W.2d 344 (Wis. Ct. App. 2001) (medical records overcharge claims brought against state hospitals), *review dismissed*, 648 N.W.2d 479 (Wis. 2002) (table); *Streich*, 399 N.W.2d at 216 (suit against all Minnesota insurance companies, all allegedly linked by common insurance regulation). Although state courts have rejected most such suits, West Virginia has now joined Massachusetts in permitting claims to be brought against private defendants who are not alleged to have injured

any named plaintiff. Indeed, in affirming certification of a class action against multiple private defendants with which the named plaintiff had never dealt, the Massachusetts Supreme Judicial Court explained that state courts "are not burdened by" federal standing requirements and "may determine, particularly when class actions are involved, that concerns other than standing, in its most technical sense, may take precedence." *Weld* v. *Glaxo Wellcome Inc.*, 746 N.E.2d 522, 529 (Mass. 2001). The recent willingness of two state Supreme Courts to countenance such suits will only embolden class counsel to bring more such claims, and encourage other state courts to permit them. Indeed, doctrinal confusion in federal case law concerning the relationship between typicality and standing requirements,[9] and the ability of state courts to relax their own state constitutional standing requirements, simply underscore the necessity of this Court's review of the erroneous decision below.

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[9] *See Juridical Links Note*, *supra*, at 501 (noting that many courts, "seemingly indifferent to [the juridical links exception's] rule 23 foundation, have mechanically applied the exceptions to standing questions"); *see also* W. Henderson, Comment, *Reconciling the Juridical Links Doctrine With the Federal Rules of Civil Procedure and Article III*, 67 U. Chi. L. Rev. 1347, 1361 (2000) ("[T]he juridical links doctrine has been described as both an exception to the Rule 23(a)(3) typicality requirement and an exception to Article III standing. This uncertainty has led to a confusing merger of procedural and jurisdictional issues and has hindered the ability of courts to define and limit the doctrine's proper application.").

CONCLUSION

For the foregoing reasons, petitioners request that the Court grant a writ of certiorari to review the decisions of the West Virginia courts.

Respectfully submitted,

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
MICHAEL D. HATCHER
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

September 30, 2002

* Counsel of Record

APPENDICES

APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2nd of July, 2002, the following order was made and entered:

No. 021221

STATE OF WEST VIRGINIA *ex rel.* UNITED HOSPITAL CENTER AND CAMDEN-CLARK MEMORIAL HOSPITAL CORPORATION,

Petitioners,

vs.

HONORABLE ARTHUR M. RECHT, Judge of the Circuit Court of Brooke County, and DANIEL J. GUIDA, individually and as the representative of the class of all similarly situated individuals,

Respondents.

On a former day, to-wit, June 12, 2002, came the petitioners, United Hospital Center, by Steptoe & Johnson, Karen E. Kahle, Gordon H. Copland and Amy M. Smith, its attorneys, and Camden-Clark Memorial Hospital Corporation, by Jackson & Kelly, Charles M. Surber, Jr., and James E. Whytsell, its attorneys, and presented to the Court their joint petition with appendix praying for a writ of prohibition to be directed against the respondents, the Honorable Arthur M. Recht, Judge of the Circuit Court of Brooke County, and Daniel J. Guida, individually and as the representative of the class of all similarly situated individuals, as therein set forth. Thereafter, on the 19th day of June, 2002, came the respondent, Daniel J. Guida, by Cassidy, Myers, Cogan, Voegelin & Tennant, Wray V. Voegelin and Donald J. Tennant, Jr.; Cranston & Edwards, and Paul R. Cranston;

Hamstead, Hamstead & Williams, and Jacques R. Williams; and Sims & McCoid, David J. Sims and Robert G. McCoid, his attorneys, and presented to the Court his written response in opposition thereto, and his motion in writing to seal said response for the reasons stated therein.

Upon consideration whereof, the Court is of opinion that a rule should not be awarded and the writ prayed for by the petitioners is hereby refused. Chief Justice Davis and Justice Maynard would grant. The motion to seal the aforesaid response is hereby granted. It is hereby ordered that the response in this matter be, and it hereby is, sealed.

A True Copy

Attest: /s/ Rory T. Perry, II.
Clerk, Supreme Court of Appeals

APPENDIX B

IN THE CIRCUIT COURT OF BROOKE COUNTY,
WEST VIRGINIA

Civil Action No. 01-C-57

DANIEL J. GUIDA, individually, and as the representative of THE CLASS OF ALL SIMILARLY SITUATED INDIVIDUALS,
Plaintiff,

vs.

WEIRTON MEDICAL CENTER, INC. *et al.*,
Defendants.

ORDER CERTIFYING CLASS

On the 6th day of May, 2002 came the plaintiff, by his counsel, and as well came the defendants, by their counsel, for a hearing upon plaintiff's motion to maintain the above-encaptioned action on behalf of a class.

WHEREUPON, the Court observed that *W.V.R. Civ.P.* 23(c)(1) directs the Court to determine whether an action brought as a class action may be so maintained and that in making such determination it was incumbent upon the Court to determine whether the prerequisites for class certification provided for under Rule 23 have been met.

WHEREUPON, the Court, having convened the parties for the purpose of conducting a hearing upon plaintiff's request for class certification, inquired as to whether any party wished to adduce testimonial evidence relevant to the question of certification and it was determined that no party desired to take testimony during the hearing.

WHEREUPON, having reviewed pleadings and file materials of record in this action, the briefs filed by the parties regarding the issue of class certification, along with the exhibits attached to said briefs, having entertained oral argument upon the instant motion, and having given mature and thoughtful consideration to the question of whether the above-encaptioned action should be maintained as a class action, the Court finds anti concludes as follows:

I. FINDINGS AND CONCLUSIONS

1. This action has been brought by the plaintiff, Daniel J. Guida, an attorney at law, practicing in Weirton, West Virginia, individually and as the representative of the class of all similarly situated individuals against multiple licensed, certified or registered health care providers in West Virginia and multiple copy companies providing photocopy services to licensed, certified or registered heath care providers in West Virginia.

2. Pursuant to the provisions of *W.Va. Code*, 16-29-1, upon written request of a patient, his authorized agent or authorized representative, health care providers who are "licensed, certified or registered under the laws of this state" are required to furnish a copy of the patient's requested records. This statute dovetails with *W.Va. Code*, 16-29-2 which provides that such health care providers are entitled to be "reimbursed" by the person requesting a copy of a patient's records, at the time of delivery "for all reasonable expenses incurred" in complying with Article 29 of West Virginia's health care records statutes which require that copies of health care records be furnished to patients or their authorized representatives. *W.Va. Code*, 16-29-2 further provides that "reimbursement" for "reasonable expenses incurred in complying with this article . . . may not exceed 75¢ per page for the copying of any record or records . . . and a search fee may not exceed $10."

3. The plaintiff, Daniel J. Guida, has alleged that he is a patient, an authorized agent of a patient or an authorized representative of a patient who has received medical care from a licensed, certified or registered health care provider in West Virginia, that he has properly requested medical records from the defendant, Weirton Medical Center pursuant to the provision of *W.Va. Code*, 16-29-1, and that in response to his request for medical records he was charged 75¢ per page for copying said medical records along with a search fee is the amount of $10 (*see*: Amended Complaint at ¶¶ 1, 7 and 8).

4. Plaintiff further contends that Weirton Medical Center and other licensed, certified or registered health care providers named as defendants in this action maintain a practice of charging patients, their authorized agents or authorized representatives who requests [sic] copies of medical records under *W.Va. Code*, 16-29-1, an amount which exceeds the allowable cost under *W.Va. Code*, 16-29-1 [sic] because the charges are more than the amount necessary to "reimburse" the defendant health care providers for "reasonable expenses incurred in complying" with Article 29 of West Virginia's health care records statutes.

5. The plaintiff has also named as defendants in this action certain "copy companies." The Court is advised that the defendant copy companies have been engaged by many of the defendant health care providers and others for the purpose of furnishing medical records to patients or their representatives who have requested such records pursuant to the provisions *W.Va. Code*, 16-29-1. It is alleged that the said defendant copy companies charge the patients, their authorized agents or authorized representatives an amount which exceeds the allowable cost under *W.Va. Code*, 16-29-2 because the charges are more than the amount necessary to "reimburse" the defendant health care providers for "reasonable expenses incurred is complying" with Article 29 of West Virginia's health care records statutes.

6. The plaintiff, Daniel J. Guida, has brought this action individually and as the representative of the class of all similarly situated persons, i.e., other patients, authorized agents of patients or authorized representatives of patients of any licensed, certified or registered health care provider in West Virginia who have made requests of such health care provider for medical records pursuant to the provisions of *W.Va. Code*, 16-29-1, and in response to said requests have been assessed charges by any defendant hospital or any defendant copy company in an amount which is alleged to exceed the charges allowable for reimbursement for reasonable expenses incurred in connection with furnishing medical records as provided for at *W.Va. Code*, 16-29-2.

7. The claims asserted by plaintiff in his Amended Complaint include an action for violation of *W.Va. Code*, 16-29-2 (*see*: Amended Complaint at ¶ 13), an action for civil conspiracy and restraint of trade (*see*: Amended Complaint at ¶¶ 17-18), an action for violation of West Virginia's Consumer Credit and Protection Act (*see*: Amended Complaint at ¶¶ 19-20), an action for unjust enrichment (*see*: Amended Complaint at ¶¶ 21-22), and a claim for punitive damages (*see*: Amended Complaint at ¶¶ 23-24).

8. The plaintiff has filed a request for class certification pursuant to the provisions of *W.V.R.Civ.P.* 23(c)(1).

9. The proponent of class certification bears the burden of establishing that the case should proceed as a class action. *Jefferson County Bd. of Ed. v Jefferson County Assn.*, 393 S.E.2d 653, 660 (WVa 1990).

10. The question of whether a circuit court should exercise its discretion to allow the class procedural device to be maintained is governed by the criteria set forth at *W.V.R.Civ.P.* 23. *Evans v. Hunting Publishing Co.*, 168 W.Va. 222, 283 S.E.2d 854, 855 (1981).

11. *W.V.R.Civ.P.* 23(a)(1)-(4) provides that a class member may bring an action as a representative party in cases where: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law and fact common to the class, (3) the claims of the representative party are typical of the claims of the class, and (4) the representative party will fairly and adequately protect the interests of the class.

12. The Court is advised that responses to discovery suggest that the defendant copy companies have handled some 250,000 requests for medical records made under *W.Va. Code*, 16-29-1 from 1996 through 2001, and thousands of additional requests for medical records have been handled by defendant hospitals which do not use copy companies. While the exact size of the class remains unknown at this juncture of the litigation process, based on general knowledge and common sense it may be assumed that the class is large, widely dispersed and that joinder is impracticable. Accordingly, the Court finds that the "numerosity" requirement of *W.V.R. Civ.P.* 23(a)(1) is met.

13. The key liability question presented in this action may be distilled to the following inquiry:

> whether patients, their authorized agents or their authorized representatives have been charged more than the amount necessary to "reimburse" the defendant health care providers for "reasonable expenses incurred" in complying with Article 29 of West Virginia's heath care records statues?

The Court finds that questions of fact or law implicated by and related to this overarching liability issue are questions which are common to all members of the putative class and that the issues presented for adjudication relative to the other causes of action alleged in the Amended Complaint also

present questions of fact and law common to the class. Accordingly, the "commonality" requirement of *W.V.R.Civ.P.* 23(a)(2) is met.

14. The representative plaintiff in this case contends that he has been overcharged for medical records in violation of *W.Va. Code*, 16-29-2 by the defendant, Weirton Medical Center, and its copy company agent, the defendant Recordex. The Court is advised that plaintiff has provided discovery responses in this case in support of his contention that he has also been overcharged for medical records by the defendant, Wheeling Hospital. Plaintiff does not, however, contend that he has had any direct dealings with any of the other named defendants. In cases where several entities are alleged to have engaged in parallel conduct that effects a class of persons in the same or similar way, the question of whether a single plaintiff who has been affected by the conduct of one of the defendants can name others who are alleged to have engaged in the challenged conduct as defendants (even though such plaintiff had no direct contact with them) requires the Court to determine whether plaintiff can demonstrate an interrelationship between the common conduct of multiple defendants and the action which he is pursuing. Under *Lamar v. H. & B. Loan Co.*, 489 F.2d 461 (9th Cir. 1973), the typicality requirement was found to prevent a plaintiff who had been harmed by one defendant from instituting a class action naming additional defendants who had not harmed plaintiff individually, but rather had engaged in similar conduct that harmed others on the basis of the Court's determination that a plaintiff who had not individual cause of action against certain defendants may not "fairly and adequately protect the interests" of those who have such cause of action. There are, however, two exceptions to the rule of *LaMar*. The first is where plaintiff has alleged a conspiracy or concerted action among the defendants; and the

second exception is where "all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious. *Id.* at 466.

15. For purposes of determining class certification issues, the allegations of the Amended Complaint are taken as true and the merits of plaintiff's claims are not examined. *Eisen v. Carlisle and Jacqueline*, 417 U.S. 156 (1974).

16. An examination of plaintiff's Amended Complaint reveals allegations that the parallel conduct of the multiple defendants is the result of a conspiracy. This case is therefore found to fall within the concerted action exception to the rule of *LaMar*.

17. The plaintiff, Daniel J. Guida, has demonstrated that his claims are similar to and consistent with those of the class which he seeks to represent; and despite the fact that he has had direct dealings with only Weirton Medical Center, Recordex and Wheeling Hospital, he has established typicality by showing connective links, ties and other interrelationships between the challenged conduct of the various additional defendants and the claims asserted in this action. The Court finds that the defendants are linked so as to suggest that a single resolution to this action will be expeditious and that this action may be distinguished factually from *State ex. rel. Erie Fire Ins. v. Madden*, 204 W.Va. 606, 515 S.E.2d 351 (1998) (per curiam). Unlike the insurance companies in *Erie*, the defendant health care providers in the instant action fall within the express purview of the West Virginia statutes which form the basis of this action as they are all "licensed, certified or registered health providers so licensed, certified or registered under the laws of this state" or agents of licensed, certified or registered health care providers who have entered into contracts for the purpose of furnishing medical records to patients or their authorized representatives who may request medical records under *W.Va. Code*, 16-29-1. Unlike the challenged conduct of the insurance companies

in *Erie* the challenged conduct of all defendants in the action *sub judice* arises directly out of their status as licensed, certified or registered health care providers in West Virginia or their agency relationship with licensed, certified or registered heath care providers in West Virginia and their unique duty to furnish medical records in accordance with the terms of the statues which are the subject of this action. The statutory scheme pursuant to which this action is brought gives rise to a cohesiveness, connective link or interrelationship between the defendants and the claims asserted in the Amended Complaint such as to support a finding that the defendants are juridically related in a manner that suggests a single resolution to this dispute is far preferable to a multiplicity of similar actions. Accordingly, this action is found to fall within the juridical link exception to rule of *LaMar*; and the typicality requirement of *W.V.R.Civ.P.* 23(a)(3) is found have been met.

18. The plaintiff, Daniel J. Guida, is a person whose rights *W.Va. Code*, 16-29-1 and 16-29-2 are designed to protect in precisely the same manner in which said statues are designed to protect the rights of the absent class members. The Court finds that Mr. Guida's interests have been shown to run parallel to the interests of the putative class with regard to the claims asserted in this action and that such interests are in no way antagonistic to the interests to the putative class. The Court further finds that Mr. Guida and his counsel have proceeded in this matter with vigor; and that Mr. Guida and his counsel have demonstrated that they are committed to diligently pursuing the claims sought to be adjudicated in this action. Accordingly, the Court finds that the adequacy requirement of *W.V.R.Civ.P.* 23(a)(4) is met in this case.

19. In addition to satisfying the prerequisites for a class action provided for at *W.V.R.Civ.P.* 23(a) this Court further finds that the prosecution of individual actions would create a risk of inconsistent or varying adjudications with respect to

individual members of the class, and that the prosecution of individual actions would create a risk of adjudication with respect to individual class members of the class which would, as a practical matter, be dispositive of the interests of other members not party to the adjudication. Further, plaintiff's claim for punitive damages may certainly be seen as implicating the limited fund doctrine such as to warrant certification under Rule 23(b)(1)(B). Accordingly, this Court finds that the circumstances for class certification set forth at Rule 23(b)(1)(A) and (B) are met in this case.

II. ORDER

In accordance with the findings and conclusions set forth hereinabove and subject to alteration or amendment under *W.V.R.Civ.P.* 23(c)(1), it is

ORDERED as follows:

1. Class Certification.

Pursuant to the provisions of *W.V.R.Civ.P.* 23(c)(1) the Court hereby determines that Civil Action Number 01-C-57, styled *Daniel J. Guida, individually, and as the representative of the class of all similarly situated individuals, plaintiff v. Weirton Medical Center, Inc., et al.*, shall be maintained as a class action under *W.V.R.Civ.P.* 23(b)(1)(A) and (B) on behalf of the following class of plaintiffs:

> All patients, authorized agents of patients, and authorized representatives of patients of any health care provider in West Virginia who have made requests of such health care provider for medical records pursuant to the provision of *W.Va.Code*, 16-29-1, since March 2, 1996 and, in response to said requests, were assessed charges by any defendant health care provider or any defendant copy company.

Pursuant to the provisions of *W.V.R.Civ.P.* 23(c)(4)(B), the Court further

ORDERS that the foregoing class shall be divided into the following subclasses which shall each be treated as a class:

Subclass A:

All patients, authorized agents of patients and authorized representatives of patients of any health care provider in West Virginia who have made requests of such health care provider for medical records pursuant to the provisions of *W.Va. Code*, 16-29-1 since March 2, 1996, and in response to said requests, have been assessed charges by any copy company named as a defendant in this action.

Subclass B:

All patients, authorized agents of patients, and authorized representatives of patients of any health care provider in West Virginia who have made requests of such health care provider for medical records pursuant to the provisions of *W.Va. Code*, 16-29-1 since March 2, 1996 and, in response to said requests, have been assessed charges by any health care provider named as a defendant in this action.

2. Class Representative; Class Counsel.

Subject to further order of the Court, Daniel J. Guida is hereby designated as class representative for the class of plaintiffs certified above and, more particularly, the sub-classes designated above as Subclass A and Subclass B. Further, attorneys Wray V. Voegelin, Donald J. Tennant, Jr., Paul R. Cranston, Jacques R. Williams, David J. Sims and Robert G. McCoid are hereby designated as counsel for the class and more particularly, the two subclasses designated above as Subclass A and Subclass B.

3. Notice

This action is not being certified under the standards set forth at *W.V.R.Civ.P.* 23(b)(3) and, accordingly, certification notice is neither required nor deemed advisable at this junction of the intigation process.

WHEREUPON, counsel for the defendants advised the Court of the defendants' intention to file a petition for a writ of prohibition in this matter and requested the Court for a stay of proceedings in order to accomplish the filing of such petition. Accordingly, the Court

ORDERED that this action shall be and is hereby stayed for a period of twenty days from the date of the entry of this Order (until June 12, 2002) so as to provide the defendants with an opportunity to prepare and present any petition for writ of prohibition which they may wish to file in this matter.

WHEREUPON, the Court further

ORDERED that the parties exceptions and objections to any adverse ruling contained herein shall be and are hereby saved and preserved.

Dated this 22nd day of May, 2002.

ENTER:

/s/ Arthur M. Recht
HONORABLE ARTHUR M. RECHT, Judge

APPENDIX C

IN THE CIRCUIT COURT OF BROOKE COUNTY,
WEST VIRGINIA

Civil Action No. 01-C-57-AMR
JUDGE ARTHUR M. RECHT

DANIEL J. GUIDA, Individually, and as the Representative of The Class of All Similarly Situated Individuals,
Plaintiffs,

vs.

WEIRTON MEDICAL CENTER, INC. *et al.*
Defendants.

ORDER DENYING MOTION TO DISMISS AND LIMITING DISCOVERY

On the 25th day of February, 2002, the parties appeared by their respective counsel: Wray V. Voegelin, Donald J. Tennant, Jr., Paul R. Cranston and David J. Sims, counsel for plaintiffs; V. Tad Greene, counsel for Summersville Memorial Hospital; Teena Murray, counsel for Weirton Medical Center, Inc., Camden-Clark Memorial Hospital Corporation, Davis Memorial Hospital, Herbert J. Thomas Memorial Hospital Association, Ohio Valley Medical Center, Inc., Rehabilitation Hospital Corporation of America, Inc., West Virginia Rehabilitation Hospital, Inc., and West Virginia University Hospitals, Inc. d/b/a WVU Hospitals and WVU Children's Hospital, Pocahontas Memorial Hospital, Preston Memorial Hospital, Broaddus Hospital, Grafton City Hospital, Inc., Healthsouth Rehabilitation Hospital of Huntington, Boone Memorial Hospital, Minnie Hamilton Health Care Center and Montgomery General Hospital; Christine S. Vaglienti, counsel for Charleston Area Medical

Center, Inc., Fairmont General Hospital, Plateau Medical Center, Inc., Princeton Community Hospital Association, Inc. and Braxton County Memorial Hospital, Inc.; Tamara DeFazio, counsel for West Virginia University Medical Corporation, Inc. and Mildred Mitchell-Bateman Hospital Auxiliary, Inc.; April C. Morgan, counsel for Wheeling Hospital, Inc. and Health Data, Inc.; Michael J. Del Giudice, counsel for Information Professionals, Inc.; Jeffrey A. Grove and David L. Delk, Jr., counsel for ChartOne, EHI/Tri-Star, Medcor, Inc., and Psychiatric Institute of West Virginia, Inc.; D. Kevin Coleman, counsel for Recordex Acquisition Corp., d/b/a F.Y.I. HealthSERVE; Landers P. Bonenberger, counsel for Smart Professional Photocopy Corporation; Nancy A. Green, counsel for Community Health Association d/b/a Jackson General Hospital, Monongalia County General Hospital Company, Highland Hospital Foundation, Inc., Appalachian Regional Healthcare, Inc. d/b/a Summers County ARH, Appalachian Regional Healthcare, Inc. d/b/a Man Appalachian Regional Healthcare Hospital; and Karen E. Kahle and Gordon H. Copland, counsel for City Hospital, Inc., Greenbrier Valley Medical Corp., Raleigh General Hospital, St. Joseph's Hospital of Parkersburg, St. Mary's Hospital of Huntington, Inc., United Hospital Center, Inc., St. Francis Hospital, St. Luke's Hospital, Grant Memorial Hospital Trust Foundation, Inc., Hampshire Memorial Hospital, Inc., Morgan County War Memorial Hospital, Potomac Valley Hospital of West Virginia, Inc., St. Joseph's Hospital of Buchannon, Inc., Stonewall Jackson Memorial Hospital Co., Putnam General Hospital, Jefferson Memorial Hospital, River Park Hospital, Webster County Memorial Hospital, Inc., and Wetzel County Hospital Association.

Thereupon, there came on for hearing the motion of defendants City Hospital and others, to dismiss the Amended

Complaint, in which motion the defendants listed in the footnote have joined.[1]

Upon considering the arguments of counsel and the other matters of record, the Court was of the opinion, for reasons stated on the record, that the motions to dismiss are not well-taken at this time. The Court therefore DENIES the motions of the defendants to dismiss the action, without prejudice to later renew them.

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[1] Greenbrier Valley Medical Corp., Raleigh General Hospital, St. Joseph's Hospital of Parkersburg, St. Mary's Hospital of Huntington, Inc., United Hospital Center, Inc., St. Francis Hospital, St. Luke's Hospital, Grant Memorial Hospital Trust Foundation, Inc., Hampshire Memorial Hospital, Inc., Morgan County War Memorial Hospital, Potomac Valley Hospital of West Virginia, Inc., St. Joseph's Hospital of Buckhannon, Inc., Stonewall Jackson Memorial Hospital Co., Putnam General Hospital, Jefferson Memorial Hospital, River Park Hospital, Webster County Memorial Hospital, Inc., Wetzel County Hospital Association, Fairmont General Hospital, Inc., Charleston Area Medical Center, Princeton Community Hospital Association, Inc., Plateau Medical Center, Inc., Braxton County Memorial Hospital, Inc., Eye and Ear Clinic of Charleston, Inc., Boone Memorial Hospital, Broaddus Hospital, Camden-Clark Memorial Hospitals Corp., Davis Memorial Hospital, Grafton City Hospital, Minnie Hamilton Healthcare Center, Montgomery General Hospital, Pocohontas Memorial Hospital, Preston Memorial Hospital, Rehabilitation Hospital Corp. of America, Reynolds Memorial Hospital, Rebound, Inc. d/b/a HealthSouth Rehabilitation Hospital of Huntington, Summersville Memorial Hospital, Thomas Memorial Hospital, West Virginia Rehabilitation Hospital, Inc., West Virginia University Hospitals, Inc., Ohio Valley Medical Center, Inc., Weirton Medical Center, Inc. ChartONE, EHI Tri-Star, Inc. Med-Cor, Inc., Recordex Acquisition Corp. d/b/a FYI HealthSERVE, Appalachian Regional Health Care, Inc. d/b/a Beckley Appalachian Regional Hospital, Appalachian Regional Healthcare, Inc. d/b/a Man Appalachian Regional Hospital, Appalachian Regional Healthcare, Inc. d/b/a Summers County ARH, Community Health Association d/b/a Jackson General Hospital, Highland Hospital Foundation, Inc., Monongalia County General Hospital Company d/b/a Monongalia General Hospital, Smart Professional Photocopy Corporation, Richwood Area Community Hospital, Inc. and West Virginia University Medical Corporation, Inc.

The Court also considered the question of the appropriate scope of discovery in light of the issues raised by the defendants and the request of the defendants. The Court is of the opinion, for the reasons stated on the record, that discovery at this time should be limited to the following: matters related to standing and jurisdiction, and matters related to the class certification issues.

Based on the foregoing, the Court does therefore ORDER that discovery in the matter shall continue, but that it shall continue only with respect to standing, jurisdiction and class certification issues. Discovery on other matters shall be stayed until resolution of the class certification question and the attendant standing issues, or until further Order of the Court.

The objections and exceptions of the plaintiff to the ruling adverse to him are noted and saved. The objections and exceptions of the defendants to the Court's rulings adverse to them are also noted and saved.

ENTER: March 18, 2002

/s/ Arthur M. Recht
ARTHUR M. RECHT, Chief Judge

Approved for Entry: /s/ [illegible]
Counsel for Plaintiff

/s/ Karen Kahle
Counsel for Moving Defendants

APPENDIX D

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

Civil Action No. 01-C-57-AMR

DANIEL J. GUIDA, individually, and as the representative of THE CLASS OF ALL SIMILARLY SITUATED INDIVIDUALS,
Plaintiff,

vs.

WEIRTON MEDICAL CENTER, INC. *et al.*
Defendants.

ORDER

This 6th day of July, 2001 came the plaintiff, by his counsel, Wray V. Voegelin, Donald J. Tennant, Jr., Jacques R. Williams, David Sims and Robert C. McCoid. As well, came the defendants, Wheeling Hospital, Inc. and Health Data, Inc. by their counsel, William Yaeger and Holly Bayhan, Weirton Medical Center and Ohio Valley Medical Center, Inc. by their counsel, Larry W. Blalock and Teena Y. Murray, Camden-Clark Memorial Hospital Corp. and Herbert J. Thomas Memorial Hospital Association by their counsel, Davis Memorial Hospital, Rehabilitation Hospital Corporation of America, Inc. and West Virginia University Hospitals, Inc. d/b/a WVU Hospitals and WVU Children's Hospitals by their counsel, William H. Hutchens, III, Charleston Area Medical Center, Inc. and Fairmont General Hospital, Inc. by their counsel, Stephen R. Brooks and Sami S. Sloboda, City Hospital, Inc., Greenbrier Valley Medical Corporation, Raleigh General Hospital d/b/a Columbia Raleigh General, St. Joseph's Hospital of Parkersburg, St. Mary's Hospital, Inc. and United Hospital Center, Inc. by

their counsel, Karen Kahle and Gordon P. Copeland, West Virginia University Medical Corporation, Inc. by its counsel, Debra H. Scudiere, Information Professionals, Inc. by its counsel, Dina L. Mohler and Hannah Curry, Cabell Huntington Hospital, Inc. by its counsel, Rebecca Craycraft Brown, EHI Tri-Star and Medcor, Inc. by its counsel, Michael G. Galloway, ChartOne, Inc. by its counsel Paul Tucker, Appalachian Regional Health Care, Inc. d/b/a Beckley Appalachian Regional Hospital by counsel Corey T. Zurbuch and Nancy A. Green for a hearing upon the defendants' motions to dismiss and plaintiff's motion to compel filed herein and noticed for hearing this day.

WHEREUPON, the court entertained discussion with regard to the defendants' motions to dismiss and for the reasons articulated by the Court, appearing in the transcript of proceedings which is attached hereto as Exhibit A, and incorporated herein by reference, the court

ORDERED that defendants' motions to dismiss shall be and are hereby denied without prejudice and with the defendant's objections and exceptions being noted and saved.

Further, with regard to the discovery issues presented for the court's consideration, the court

ORDERED as follows:

1. The defendants shall file responses to plaintiff's second set of discovery on or before August 6, 2001 and that in responding to discovery requests made in this action the defendants shall supply information for the five years next preceding the institution of suit (i.e. March 1996).

2. That the court's ruling on the defendants' objections based on patient confidentiality concerns shall be deferred, and that until such time as the confidentiality issue is ruled upon the defendants need not respond to any discovery requests requiring them to divulge the names of

patients who have requested records or any patient's medical record. The defendants are, however, required to respond to interrogatories geared to ascertain the following information:

a. The number of persons who have requested medical records pursuant to *W.Va.Code*, 16-29-1.

b. The number of copies that have been produced in response to the said requests for medical records made pursuant to *W.Va.Code*, 16-29-1.

c. The charges made for medical records furnished pursuant to the said requests for medical records made pursuant to *W.Va.Code*, 16-29-1.

3. Objections to plaintiff's discovery requests will be heard on August 10, 2001 at 1:00 p.m.

4. The class certification question is set for hearing by the court on August 24, 2001 at 10:00 a.m.

Enter this 28th day of September, 2001.

ENTERED:

/s/ Arthur M. Recht
ARTHUR M. RECHT, JUDGE
Circuit Court of Brooke County

APPENDIX E

W. Va. Code § 16-29-1. Copies of health care records to be furnished to patients

Any licensed, certified or registered health care provider so licensed, certified or registered under the laws of this state shall, upon the written request of a patient, his authorized agent or authorized representative, within a reasonable time, furnish a copy, as requested, of all or a portion of the patient's record to the patient, his authorized agent or authorized representative subject to the following exceptions:

(a) In the case of a patient receiving treatment for psychiatric or psychological problems, a summary of the record shall be made available to the patient, his authorized agent or authorized representative following termination of the treatment program.

(b) Nothing in this article shall be construed to require a health care provider responsible for diagnosis, treatment or administering health care services in the case of minors for birth control, prenatal care, drug rehabilitation or related services or venereal disease according to any provision of this code, to release patient records of such diagnosis, treatment or provision of health care as aforesaid to a parent or guardian, without prior written consent therefor from the patient, nor shall anything in this article be construed to apply to persons regulated under the provisions of chapter eighteen of this code or the rules and regulations established thereunder.

(c) The furnishing of a copy, as requested, of the reports of X-ray examinations, electrocardiograms and other diagnostic procedures shall be deemed to comply with the provisions of this article: Provided, That original radiological study film from a radiological exam conducted pursuant to a request from a patient or patient's representative shall be provided to the patient or

patient's representative upon written request and payment for the exam. The health care provider shall not be required to interpret or retain copies of the film and shall be immune from liability resulting from any action relating to the absence of the original radiological film from the patient's record.

(d) This article shall not apply to records subpoenaed or otherwise requested through court process.

(e) The provisions of this article may be enforced by a patient, authorized agent or authorized representative, and any health care provider found to be in violation of this article shall pay any attorney fees and costs, including court costs incurred in the course of such enforcement.

(f) Nothing in this article shall be construed to apply to health care records maintained by health care providers governed by the AIDS-related medical testing and records confidentiality act under the provisions of article three-c of this chapter.

(Acts 1983, c. 101; Acts 1990, c. 95; Acts 1992, c. 96.)

W. Va. Code § 16-29-2. Reasonable expenses to be reimbursed

(a) The provider shall be reimbursed by the person requesting in writing a copy of the records at the time of delivery for all reasonable expenses incurred in complying with this article: Provided, That, the cost may not exceed seventy-five cents per page for the copying of any record or records which have already been reduced to written form and a search fee may not exceed ten dollars.

(b) Notwithstanding the provisions of subsection (a) of this section, a provider shall not impose a charge on an indigent person or his or her authorized representative if the

medical records are necessary for the purpose of supporting a claim or appeal under any provisions of the Social Security Act, 42 U.S.C. § 301 et seq.

(c) For purposes of this section, a person is considered indigent if he or she:

(1) Is represented by an organization or affiliated pro bono program that provides legal assistance to indigents; or

(2) Verifies on a medical records request and release form that the records are requested for purposes of supporting a social security claim or appeal and submits with the release form reasonable proof that the person is financially unable to pay full copying charges by reason of unemployment, disability, income below the federal poverty level, or receipt of state or federal income assistance.

(d) Any person requesting free copies of written medical records pursuant to the provisions of subsection (b) of this section is limited to one set of copies per provider. Any additional requests for the same records from the same provider shall be subject to the fee provisions of subsection (a).

(Acts 1983, c. 101; Acts 1990, c. 95; Acts 1992, c. 96; Acts 1999, c. 140, eff. 90 days after March 11, 1999.)

SUPREME COURT, U.S.
FILED
OCT 21 2002
OFFICE OF THE CLERK

No. 02-512

IN THE

Supreme Court of the United States

UNITED HOSPITAL CENTER *et al.*,

Petitioners,

v.

DANIEL GUIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of West Virginia

BRIEF OF RESPONDENT WEST VIRGINIA REHABILITATION HOSPITAL, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
MICHAEL D. HATCHER
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Respondent in Support

October 21, 2002

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment prohibits state courts from allowing a class representative to sue private parties that are not alleged to have caused the named plaintiff any injury whatsoever.

PARTIES TO THE PROCEEDING

The parties to the proceeding are West Virginia Rehabilitation Hospital, Inc. ("Respondent in Support"), a defendant in the courts below who did not join the Petition for a Writ of Certiorari to this Court, but now files this Brief of Respondent West Virginia Rehabilitation Hospital, Inc. in Support of the Petition for a Writ of Certiorari, the 54 defendants listed immediately below who joined the Petition for a Writ of Certiorari to this Court, 13 other defendants listed below who did not join the Petition, and Respondent.

The Petitioners are: Appalachian Regional Healthcare, Inc. d/b/a Beckley Appalachian Regional Hospital, Appalachian Regional Healthcare, Inc. d/b/a Man Appalachian Regional Healthcare Hospital, Boone Memorial Hospital, Braxton County Memorial Hospital, Inc., Broaddus Hospital, Cabell Huntington Hospital, Camden-Clark Memorial Hospital Corporation, Charleston Area Medical Center, ChartOne, Inc., City Hospital, Inc., Community Health Assoc. d/b/a Jackson General Hospital, Davis Memorial Hospital, Eye and Ear Clinic of Charleston, Fairmont General Hospital, Inc., Grafton City Hospital, Grant Memorial Hospital Trust Foundation, Inc., Greenbrier Valley Medical Corp./Triad, Herbert J. Thomas Memorial Hospital, Highland Hospital Foundation, Inc., Jefferson Memorial Hospital, Medcor, Inc., Minnie Hamilton Health Care Center, Inc, Monongalia County General Hospital Company, Montgomery General Hospital, Morgan County War Memorial Hospital, Ohio Valley Medical Center, Plateau Medical Center, Inc., Pocahontas Memorial Hospital, Preston Memorial Hospital, Princeton Community Hospital Assoc., Putnam General Hospital, Raleigh General Hospital, Rebound Inc., Rehabilitation Hospital Corporation of America, Rehabilitation Hospital Corporation of America, d/b/a Healthsouth Western Hills, Rehabilitation Hospital Corporation of America, d/b/a Healthsouth Southern Hills,

Reynolds Memorial Hospital, Smart Document Solutions, LLC (formerly known as Smart Professional Photocopy Corporation), Saint Francis Hospital, St. Luke's Princeton LLC d/b/a St. Lukes Hospital, St. Joseph's Hospital, St. Joseph's Hospital of Buckhannon, Inc., St. Mary's Hospital of Huntington, Inc., Stonewall Jackson Memorial Hospital Co., Summers County Appalachian Regional Hospital, Summersville Memorial Hospital Comm., Tri-City Health Services, Inc. d/b/a HCA Columbia River Park Hospital, United Hospital Center, Inc., Webster County Memorial Hospital, Inc., West Virginia Rehabilitation Hospital, Inc., d/b/a Healthsouth Mountain View, West Virginia University Medical Corporation, Inc., West Virginia University Hospitals, Inc., Wetzel County Hospital, and Wheeling Hospital, Inc.

The defendants, other than West Virginia Rehabilitation Hospital, Inc., who did not join the Petition for a Writ of Certiorari to this Court are: EHI Tri-Star, Inc., Hampshire Memorial Hospital, Inc., Health Management Assoc. d/b/a Williamson Memorial Hospital, Information Professionals, Mildred Mitchell-Bateman Hospital Aux., Inc., Pleasant Valley Hospital, Inc., Potomac Valley Hospital of W.Va., Inc., Psychiatric Institute of West Virginia, Inc. d/b/a Chestnut Ridge Psychiatric Hospital, Recordex Acquisition Corp., Richwood Area Community Hospital, Inc., Roane General Hospital Foundation, Inc., Sistersville General Hospital, Inc., and Weirton Medical Center, Inc.

Respondent in Support West Virginia Rehabilitation Hospital, Inc. is a non-governmental corporation whose ultimate parent corporation is Healthsouth Corp. FMR Corp., as parent company of various Fidelity mutual funds, reported as of December 31, 2001, that various Fidelity mutual funds beneficially owned more than 10% of Healthsouth Corp.'s common stock. Healthsouth Corp. is unaware of the current holdings of FMR Corp. and its affiliates. Healthsouth Corp.

has not received notice of any other holders of more than 10% of Healthsouth Corp.'s common stock.

BRIEF OF RESPONDENT WEST VIRGINIA REHABILITATION HOSPITAL, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 12.6, Respondent in Support of the Petition, West Virginia Rehabilitation Hospital, Inc., hereby files this Brief of Respondent West Virginia Rehabilitation Hospital, Inc. in Support of the Petition for a Writ of Certiorari. Respondent in Support adopts and incorporates the reasons for granting a writ of certiorari contained within the Petition for a Writ of Certiorari filed in this case by the 54 Petitioners-Defendants.

CONCLUSION

Respondent in Support respectfully requests that the Court grant the Petition for a Writ of Certiorari filed in this case and issue a writ of certiorari to review the decisions of the West Virginia courts.

Respectfully submitted,

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
MICHAEL D. HATCHER
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Respondent in Support

October 21, 2002

* Counsel of Record

Supreme Court, U.S.
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No. 02-512

IN THE

Supreme Court of the United States

UNITED HOSPITAL CENTER, *et al.*,
Petitioners,

v.

DANIEL GUIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WEST VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WRAY V. VOEGELIN, ESQ.
Counsel of Record
DONALD J. TENNANT, JR., ESQ.
CASSIDY, MYERS, COGAN,
VOEGELIN & TENNANT, L.C.
The First State Capitol
1413 Eoff Street
Wheeling, WV 26003-3582
(304) 232-8100

(For Additional Counsel See Inside Cover)

Wright Appellate Services 1012
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

PAUL R.CRANSTON, ESQ.
CRANSTON & EDWARDS, P.L.L.C.
Dorsey Avenue Professional Building
1200 Dorsey Avenue, Suite II
Morgantown, WV 26505
(304) 296-3500

JACQUES R. WILLIAMS, ESQ.
HAMSTEAD, HAMSTEAD & WILLIAMS
231 Walnut Street
Morgantown, WV 26505
(304) 296-3636

DAVID J. SIMS, ESQ.
ROBERT G. MCCOID, ESQ.
SIMS & MCCOID
1201 Main Street
Wheeling, WV 26003
(304) 242-2000

Attorneys for Respondent,
David Guida

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STATEMENT OF CASE

This Brief in Opposition to the Petition For Writ of Certiorari filed in this matter is submitted on behalf of the respondent, Daniel Guida, individually and as the representative of the class of all similarly situated individuals. The following factual backdrop and procedural history include additional facts or clarifications of the statements contained in the petition for writ of certiorari.

I. FACTUAL BACKDROP

A. The West Virginia Statutes at Issue

Pursuant to the provisions of *W.Va. Code*, 16-29-1, upon written request of a patient, his authorized agent or authorized representative, health care providers in West Virginia are required to furnish a copy of the patient's requested records. Under *W.Va. Code*, 16-29-2, West Virginia health care providers are entitled to be "reimbursed" by the person requesting a copy of a patient's records, at the time of delivery, "for reasonable expenses incurred" in complying with the statute's requirement that copies of health care records be furnished to patients or their authorized representatives. *W.Va. Code*, 16-29-2 further provides that the "reimbursement" for "reasonable expenses incurred in complying with this article...may not exceed 75¢ per page for the copying of any record or records...and a search fee may not exceed $10.00."

B. The Defendants are Overcharging for Medical Records

The term "reimburse" means: "to pay back, to make restoration, to repay that expended; to indemnify, or make whole." Black's Law Dictionary 5th Ed. at P. 1557. Other authorities define "reimburse" as: "1. [t]o pay back; to repay. 2. [t]o make restitution of an equivalent to (a person); indemnify." Webster's New Collegiate Dictionary. And "to repay or make up to one (a sum expended)." The Oxford English Dictionary. Thus, "reimbursement" is the act of reimbursing or paying somebody back money spent for an approved reason. In applying this term to *W.Va. Code*, 16-29-2 it becomes clear that health care providers in West Virginia are entitled to be "paid back" for reasonable expenses incurred in complying with a request by a patient or his authorized representative for a copy of a patient's medical records, with the proviso that the cost charged to the requestor for such reimbursement may not exceed 75¢ per page and a $10 search fee.

Despite the clear statutory language which limits a health care provider's right to charge patients or their authorized representatives only an amount sufficient to be "reimbursed" or "paid back" for reasonable expenses incurred in complying with a request for medical records, the defendant health care providers in the action below, including petitioners herein, and their copy company agents have routinely engaged in the practice of charging the statutory maximum even though this maximum rate far exceeds the amount necessary to "reimburse" or "pay back" the hospitals for reasonable expenses incurred in complying with such requests for medical records.

The representative plaintiff's responses to discovery confirm that he has requested medical records in his capacity as an authorized representative of patients of the defendant, Weirton Medical Center, pursuant to the provisions of *W.Va. Code*, 16-29-1; and in order to obtain the requested medical records, he was charged 75¢ per page and a $10 search fee. This is the same cost that the great majority of statutory medical record requestors are charged for medical records throughout West Virginia.

Although *W.Va. Code,* 16-29-2 clearly limits the amount which health care providers in West Virginia are allowed to charge for medical records requested by a patient or his authorized representative to a sum necessary for such health care provider to be "reimbursed" or "paid back" for reasonable expenses incurred in complying with such requests for medical records, discovery adduced in this action to date has made it apparent that the defendant health care providers, acting in combination with their copy company agents and otherwise, are charging statutory medical record requestors amounts significantly in excess of what is necessary for reimbursement. Indeed, the contracts between the defendant health care providers and the defendant copy companies which have been produced in this matter clearly demonstrate that hospitals throughout West Virginia have chosen to enter into "sweetheart" deals with copy companies whereby they allow the copy companies to charge statutory medical record requestors the maximum rate in return for the copy companies' agreement to kick-back a portion of the statutory "search fee" while also providing no cost or low cost copies to the hospitals.

The representative plaintiff contends that the burden of paying for "free" copies that the hospitals give to other health care providers and certain insurance companies, and "courtesy copies" that are given to the hospital for its administrative needs, should not be borne by statutory medical requestors; and that forcing the statutory requestors to subsidize these sweetheart deals is in direct contravention of the provisions of *W.Va. Code, 16-29-2.*

This Court should not be misled by the hospitals' utilization of Webster Memorial Hospital as an "illustrative" petitioner. Webster Memorial's billing practices are not representative of the other hospitals which have been named as defendants in this case. Based on the discovery provided to date, it appears that Webster Memorial is the only defendant which charges 75¢ per page while not charging statutory medical record requestors an additional $10 search fee. Webster Memorial's charge of only 75¢ per page without a search fee is truly unique and begs the question of how it is able to do this when the other hospitals and copy companies require a $10 search fee under the same "reimbursement" statute.

C. The Amended Complaint

The representative plaintiff in this case has alleged that he is a patient, an authorized agent of a patient, or an authorized representative of a patient who has received medical care from a licensed, certified, or registered health care provider in West Virginia. He has alleged that he has properly requested medical records from the defendant, Weirton Medical Center, pursuant to the provisions of *W.Va. Code*, 16-29-1. He has further alleged that in response to his request for

medical records he was charged 75¢ per page for copying said medical records along with a search fee in the amount of $10. These facts are not in dispute.

The representative plaintiff contends Weirton Medical Center and the other defendant hospitals maintain a practice of charging patients, their authorized agents or authorized representatives who request copies of medical records under *W.Va. Code*, 16-29-1 an amount which exceeds the allowable cost under *W.Va. Code*, 16-29-2 because the charges are more than the amount necessary to "reimburse" or "pay back" the defendant hospitals for "reasonable expenses incurred in complying" with Article 29 of West Virginia's Health Care Records statutes.

The representative plaintiff has also named as defendants certain "copy companies." It is alleged that the defendant copy companies have been engaged by certain of the defendant hospitals for purposes of furnishing medical records to patients or their representatives who have requested the same pursuant to the provisions of *W.Va. Code*, 16-29-1, and that said defendant copy companies charge the patients, their authorized agents or authorized representatives amounts which exceed the amount necessary for "reimbursement" of reasonable expenses incurred in connection with furnishing medical records.

D. Claims Asserted

Count I of the amended complaint states a cause of action for violation of *W.Va. Code*, 16-29-2. This cause of action relates to the defendants' overcharging for medical records. It is expressly authorized by *W.Va. Code*, 16-29-1(e), which

states that the provisions of Chapter 16, Article 29 of the West Virginia Code may be enforced by a patient, his authorized agent, or authorized representative.

Count II of the amended complaint sets forth a cause of action for civil conspiracy and restraint of trade This cause of action is based upon the allegation that the defendant hospitals have acted in combination and concert with each other and/or with certain of the defendant copy companies in violation of the provisions of *W.Va. Code*, 16-29-2 such as to constitute a civil conspiracy and/or an unlawful restraint of trade violative of the West Virginia Antitrust Act (*W.Va. Code*, 47-18-1, et seq.).

Count III of the amended complaint sets forth a cause of action for violation of West Virginia's Consumer Credit and Protection Act. Pursuant to the provisions of *W.Va. Code*, 46A-6-104, unfair methods of competition and unfair or deceptive acts or practices in the conduct of commerce are unlawful.

Count IV of the amended complaint states a cause of action for unjust enrichment. The principle of "unjust enrichment" applies when one person has in his possession money which has come into his hands under circumstances which make it unjust for him to retain it and which, in equity and good conscience, belongs to some other person. *Shanks v. Wilson*, 86 F.Supp. 789 (S.D. W.Va. 1949). Plaintiff's remedy for unjust enrichment arises by implication and rests upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of others. *Blue Creek Development Co. v. Howell*, 101 W.Va. 748, 133 S.E.2d 699 (1926).

Finally, Count V of the amended complaint states a cause of action for punitive damages. This claim is premised upon the defendants' overcharging for medical records which is alleged to have been committed intentionally and in willful, wanton and reckless disregard of the rights of plaintiff and the class of all similarly situated individuals.

This Court will note that all of the claims asserted in the amended complaint arise under West Virginia law and that there is no question of federal law presented in this action.

II. PROCEDURAL BACKDROP

On March 2, 2001, the representative plaintiff filed his initial complaint in this action. Upon hearing the defendants' joint motion for an extension of time in which to answer or otherwise plead to said complaint and joint motion for a protective order staying discovery, the circuit court extended the time within which the defendants could file responsive pleadings and respond to outstanding discovery requests to May 15, 2001.

Thereafter, the defendants filed motions to dismiss under *W.V.R.Civ.P.* 12(b)(6) and, as well, certain defendants filed motions to dismiss premised upon *W.V.R.Civ.P.* 12(b)(3).

On July 6, 2001, a hearing was conducted upon the defendants' motions to dismiss and such motions were denied (*See* Petition at App. D). The circuit court further ordered the defendants to file responses to plaintiff's second set of discovery on or before August 6, 2001, with the understanding that the defendants need only supply information for the five years next preceding the institution of suit (i.e. March 1996). The circuit court deferred ruling upon the defendants' objec-

tions based on patient confidentiality and ordered that until such time as the confidentiality issue was heard and ruled upon, the defendants need not respond to any discovery requests requiring them to divulge the identity of any patient who requested medical records or any patient's medical record. The defendants were, however, required to respond to certain specified discovery requests.

On August 24, 2001, the parties convened for a hearing which was limited to discovery concerns related to the defendant copy companies and such copy companies were ordered to provide certain information with regard to copy services performed for hospitals within the geographic boundaries of West Virginia from 1996 forward.

By agreed order entered on September 27, 2001, the representative plaintiff was granted leave to file an amended complaint, and the same was thereafter properly lodged with the circuit clerk.

On December 28, 2001, the parties appeared for a status conference and an agenda was established for answers to the amended complaint to be filed and dates were set for hearings upon discovery disputes, the newly added defendants' motions to dismiss, and the certification question. The defendants filed a motion to dismiss the amended complaint pursuant to *W.V.R.Civ.P.* 12(b)(1)(3), and (6). On February 25, 2002, after reviewing exhaustive briefing by all sides, the circuit court heard argument upon the motions to dismiss. For reasons consistent with the earlier ruling upon the initial motions to dismiss, the circuit court denied the motions to dismiss (*See* Petition at App. C).

On May 6, 2002, the circuit court conducted a hearing upon plaintiff's motion to maintain the action below on behalf of a class and by order entered on May 22, 2002, the circuit court determined that the action should be maintained as a class under *W.V.R.Civ.P.* 23(b)(1)(A)and(B). Because the defendants expressed their intention to file a petition for writ of prohibition before the Supreme Court of Appeals of West Virginia, the circuit court stayed the action so as to provide the defendants with an opportunity to present a petition to the West Virginia high court.

On June 12, 2002, the defendants filed an original proceeding seeking a Writ of Prohibition against the chief judge of the First Judicial Circuit Court and Daniel J. Guida, individually, and as the representative of the class of all similarly situated individuals. Upon consideration of extensive briefing submitted by all parties, the Supreme Court of Appeals of West Virginia refused the petition on July 2, 2002.

On September 20, 2002, Wheeling Hospital and certain other defendant health care providers filed a motion for decertification in the circuit court. Such motion has been fully briefed and is currently pending in the state court proceeding below.

Further, the parties have agreed to the entry of a case management order in this matter which provides that all parties may continue to conduct discovery through June 9, 2003, allows any party to file dispositive motions on or before June 30, 2003, and establishes a trial date of August 4, 2003.

III. THE ORDER CERTIFYING CLASS

The Order Certifying Class entered in the state court proceedings provides for this action to be maintained as a class action under *W.V.R.Civ.P.* 23(b)(1)(A) and (B) on behalf of the following class of plaintiffs:

> All patients, authorized agents of patients, and authorized representatives of patients of any health care provider in West Virginia who have made requests of such health care provider for medical records pursuant to the provision of *W.Va. Code*, 16-29-1, since March 2, 1996 and, in response to said requests, were assessed charges by any defendant health care provider or any defendant copy company.

Further, pursuant to the provisions of *W.V.R.Civ.P.* 23(c)(4)(B) the circuit court ordered the foregoing class to be divided into the following subclasses which would each be treated as a class:

Subclass A:

> All patients, authorized agents of patients and authorized representatives of patients of any health care provider in West Virginia who have made requests of such health care provider for medical records pursuant to the provisions of *W.Va. Code*, 16-29-1 since March 2, 1996, and in response to said requests, have been assessed charges by any copy company named as a defendant in this action.

Subclass B:

> All patients, authorized agents of patients, and authorized representatives of patients of any health care provider in West Virginia who have made requests of such health care provider for medical records pursuant to the provisions of *W.Va. Code*, 16-29-1 since March 2, 1996 and, in response to said requests, have been assessed charges by any health care provider named as a defendant in this action.

The primary class certified in this matter is comprised of all statutory medical record requestors who were assessed charges by any defendant health care provider or any copy company since March 2, 1996. While this class definition is not an overbroad or otherwise inappropriate outline of class boundaries, under *W.V.R.Civ.P.* 23(c)(4) subclass creation is well recognized as an appropriate method to aid in the efficient and manageable adjudication of class action suits. (*See* Newberg on Class Actions, 3rd Edition at §8.12).

During the certification proceedings in this matter, it became apparent that some defendant health care providers utilized the defendant copy companies as intermediaries in charging statutory medical record requestors for medical records while other defendant health care providers charged statutory medical record requestors directly. Although the members of both Subclass A and Subclass B challenge the same conduct (i.e., charging for medical records in amounts which exceed the charges allowable under *W.Va. Code*, 16-

29-2), the members of Subclass A were actually charged by copy company defendants in their capacity as agents for the defendant health care providers, while members of Subclass B were directly charged for medical records by the defendant health care providers.

The claims of the members of Subclass A are entirely consistent with the claims of the members of Subclass B. However, the claims of Subclass A members require the establishment of additional elements pertaining to the agency relationship between the defendant health care providers and the defendant copy companies. The Subclass A members must show that the defendant copy companies were acting on behalf of the defendant health care providers when they engaged in the challenged conduct, while the Subclass B members need only establish that the health care providers with whom they dealt charged them amounts in excess of the allowable charges provided for under *W.Va. Code*, 16-29-2.

As a method of assuring that the presentation and adjudication of differing claims can be efficiently administered, *W.V.R.Civ.P.* 23(c)(4)(B) provides courts with authority to split a class into subclasses so long as each subclass satisfies the prerequisites of *W.V.R.Civ.P.* 23(a) and (b). (*See* Manual For Complex Litigation, 3rd Edition at 30.15). Hence, in cases where the provisions of *W.V.R.Civ.P.* 23(a) and (b) may be satisfied with respect to each subclass, the use of subclasses to aid in the efficient and manageable adjudication of this action constitutes an appropriate exercise of the state court's discretion under *W.V.R.Civ.P.* 23(c)(4)(B).

IV. DISCUSSION

A. Jurisdiction

While the petitioners make the conclusory statement that the July 2, 2002, order entered by the Supreme Court of Appeals of West Virginia constitutes a "final judgment" such as to provide this Court with jurisdiction pursuant to 28 U.S.C. §1257(a), the West Virginia high court's denial of the petition for writ of prohibition in this matter cannot, in any real sense, be construed to be a final judgment. In fact, as noted above, discovery is still continuing in this action and no "judgment" of any kind or character has been entered against the petitioners. If, and when, a judgment is entered against the defendants in the state court proceeding, they will have an opportunity to file an appeal with the Supreme Court of Appeals in West Virginia. It is only after the West Virginia high court affirms or denies the validity of such judgment that the issues presented by this appeal can truly be said to have been finally disposed of by the state supreme court.

The petitioners imply that the state supreme court, by denying the petition for writ of prohibition below, may have brought this case within the exceptions to the finality requirement set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-80 (1975). Presumably, this is on the basis that: (1) the federal issue is conclusive, and the outcome of further proceedings is preordained; or (2) the federal questions that could come to this Court have been adjudicated by the state courts and the remaining issues will not give rise to any further federal question. However, whether these exceptions to the finality requirement even apply to this case is less than apparent. The outcome of this case is far from cer-

tain and the Supreme Court of Appeals of West Virginia did not address any federal issue in its ruling.

The state court proceedings below deal exclusively with matters of state law. The statutes which form the basis of the representative plaintiff's claims relate solely to West Virginia health care providers, and the propriety of allowing the action to proceed as a class was decided under the applicable provisions of *W.V.R.Civ.P.* 23 and interpretive West Virginia case law. Hence, because the state court rulings below were based on adequate and independent state grounds, this Court should not undertake review of the federal issue presented by petitioners herein.

B. The Constraints of Article III Do Not Apply to State Courts

The petitioners' reliance on certain due process decisions as the model for "fair play and substantial justice" is an artful – but ultimately irrelevant – segue to their Article III argument. What is at issue in this case is not remotely comparable to the due process concerns of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) in the context of long-arm jurisdiction, or in the context of an accused's competence to stand trial as in *Cooper v. Oklahoma*, 517 U.S. 348 (1996). Federal courts have historically scrutinized state court action in criminal cases where violation of federal constitutional principles have been asserted. *See* e.g., *Malinski v. New York*, 65 S.Ct. 781 (1945). Concerns of long-arm jurisdiction obviously bear on important issues of federalism. Here, however, there simply exists no reasonable correlation between jurisdictional principles of "minimum contact" by a non-resident defendant, and the supposed duty of "minimum

contact" between a plaintiff class representative and a collection of resident defendants. Indeed, for the reason discussed by the court recently in *Payton v. Cty. of Kane*, 00-3789 (7th Cir. 2002), Article III would not necessarily accomplish the petitioners' objective even if this was a federal case. In any event, as will be discussed below, Article III has no applicability to this state court proceeding.

The doctrine of standing is derived from the "case or controversy" requirement of Article III. The federal standing doctrine limits the reach of Article III courts by imposing strict entry requirements on litigants seeking redress in federal courts. This Court, however, has made it clear that the constraints of Article III do not apply to state courts. Consequently, state courts are not bound by the limitation of Article III "case or controversy" or other federal rules relating to justiciability. *See*, e.g., *Pennell v. San Jose*, 485 U.S. 1, 8 (1988); *Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429 (1952).

The recognition by this Court of the inapplicability of Article III's standing requirements to state courts extends even to state courts' interpretation of the federal Constitution and federal law. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (citations omitted). As the Court has further noted, "[w]hile state courts are fully entitled to entertain disputes that would not qualify as cases or controversies under Article III, it is questionable whether they have the power, by granting or denying third-party standing, to create or destroy federal causes of action." *U.S. Dept. of Labor v. Triplett*, footnote, 494 U.S. 715, 721 (1994) (citation omitted).

Thus, to the extent that this Court has imposed Article III's limitations concerning third-party standing in the context of state court decisions, the scope of such limitations has been explicitly confined to state courts' interpretations of federal law. In the matter *sub judice*, no federal cause of action is implicated, and no West Virginia court has rendered binding interpretations of federal constitutional provisions or other federal law.

The very inapplicability of the federal justiciability doctrines emanating from Article III, recognized repeatedly by this Court (and yet altogether ignored by petitioners), has also been recognized and embraced by state courts beyond West Virginia. *See Weld v. Glaxo Welcome, Inc.*, 746 N.E.2d 522, 529 (Mass. 2001) ("State courts, however, are not burdened by [federal] jurisdictional concerns, and, consequently, may determine, particularly when class actions are involved, that concerns other than standing, in its most technical sense, may take precedence.") (citation omitted); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1081-82 (Ohio 1999) ("[S]tate courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits").

Moreover, while this Court may have jurisdiction to hear and decide the instant petition, the Rules of this Court raise serious questions concerning the advisability of hearing and determining the same. *See* Rule 10(b) and (c), Rules of the Supreme Court. Indeed, to adopt the argument urged by petitioners (i.e. that the due process considerations embodied in the fourteenth amendment to the federal Constitution some-

how compel this Court to impose Article III's federal standing requirements on state court litigants) would require this Court to abandon well-settled (and well grounded) precedent "recognized often" by this Court. *ASARCO, Inc.*, 490 U.S. at 617. *See also Pennell v. San Jose*, 485 U.S. 1 (1988).

In *State ex rel. Erie Fire Ins. v. Madden*, 204 W.Va. 606, 515 S.E.2d 351 (1998) the Supreme Court of Appeals of West Virginia had occasion to review a situation where a representative plaintiff in a class action, having dealt with only one defendant, brought a class action against multiple defendants alleged to have engaged in discrete but similar practices that collectively injured the plaintiff class. The defendants with whom the proposed representative plaintiff had not had prior dealings moved to dismiss the action on the basis that the plaintiff had no direct claim against them. The trial court denied the motion after determining that the plaintiff could act as a class representative for persons who had claims against the other defendants even though plaintiff had no personal claim against them based on its finding of a "juridical link." Upon reviewing the trial court's decision on writ of prohibition, the West Virginia high court found that the factors relied upon by the trial court did not support a finding of a juridical link and remanded the action with instructions for the circuit court to grant the defendants' motion to dismiss.

In ruling upon the petition for prohibition in *Erie v. Madden*, the high court of West Virginia took cognizance of the petitioners' argument that because the representative plaintiff did not have a personal claim against each of the named defendants, she did not present the circuit court with a justiciable case or controversy over which the circuit court had

subject matter jurisdiction under the West Virginia state constitution. In discussing the "standing" issue, the *Erie v. Madden* court harkened back to its earlier decision in *Snyder v. Callaghan*, 168 W.Va. 265, 284 S.E.2d 241 (1981) where it observed that:

> "the question of standing to sue is whether the litigant has alleged such a personal stake in the outcome of the lawsuit so as to present the court with a justiciable controversy warranting judicial resolution of the dispute. In order to have standing to sue, a party must allege an injury in fact, either economic or otherwise, which is the result of the challenged action and show that the interest he seeks to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation, or constitutional guarantee which is the basis for the lawsuit."

The West Virginia high court has also noted that "in West Virginia, the slippery doctrine of standing is not usually employed to avoid a frontal confrontation with an issue of legitimate public concern." *State ex rel. Alsop v. McCartney*, 159 W.Va. 829, 838, 228 S.E.2d 278, 283 (1976). Further, in *Eastern Associated Coal Corp. v. Doe*, 159 W.Va. 200, 220 S.E.2d 672 (1975), the West Virginia court recognized that "a simple, easily comprehensible definition of subject matter jurisdiction is almost a contradiction in terms. Complex issues often make the determination of subject matter jurisdiction difficult, as for example, justiciablility, ripeness, mootness, standing, case or controversy, and politic questions." *Id.*

Indeed, due to "the slipperiness of standing issues and the complexity of subject matter jurisdiction jurisprudence" and based on what was termed "the prudence that cautions against deciding constitutional matters when it is unnecessary to do so," the *Erie v. Madden* court expressly declined "the invitation to engage in a constitutional subject matter jurisdictional 'standing' analysis to decide whether and when a representative plaintiff on behalf of a class that has been allegedly injured by multiple defendants may assert claims against defendants who are not alleged to have personally injured the named plaintiff." *Erie v. Madden* at fn. 6. Instead, the West Virginia high court elected to address the issue of whether the named plaintiff had the ability to present the claims of absent class members against defendants with whom she had no personal dealing in the context of *W.V.R.Civ.P.* 23.

Indeed, in reaching this conclusion, the West Virginia high court noted that: "A similar approach was taken by the United States Supreme Court in the recent case of *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct.2231, 138 L.Ed.2d 689 (1997)." In *Amchem Products, Inc.*, this Court faced arguments that a class action did not present a justiciable case or controversy. The *Amchem Products, Inc.* court, however, expressly declined to address those issues, and found that Rule 23 issues are "logically antecedent to the existence of any Article III [justiciability] issue, [and therefore] it is appropriate to reach them first." *Amchem Products, Inc.*; *See also Ortiz v. Fibre Board Corp.*, 537 U.S. 815 (1999). Likewise, the state court rulings which found the class procedural device to be appropriate in this action were

reached only after a careful application of the criteria provided for under *W.V.R.Civ.P.* 23.

C. The Class Procedural Device is Appropriate in this Action

The state court properly found that the question of whether the class procedural device should be allowed is primarily governed by *W.V.R.Civ.P.* 23 (Petition App. B at ¶10; *Evans v. Huntington Publishing Co.*, 283 S.E.2d 854, 855 (W.Va.1981)).[1] The Order Certifying Class provides that, under *W.V.R.Civ.P.* 23(a)(1)-(4), a class member may bring an action as a representative party in cases where: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the representative party are typical of

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[1] The Wisconsin Court of Appeals recently evaluated a class claim for overcharging asserted against medical record providers (including hospital and copy company defendants). *Cruz v. All Saints Healthcare Systems, Inc.*, 242 Wis.2d 432, 624 N.W.2d 344 (Wis. Ct. App. 2001). Although that opinion dealt with a "reasonable charge" statute as opposed to a "reimbursement" statute, the court noted that "given the economic realities of [the] case, class action may be the only effective means to implement the legislature's intent to provide redress for unreasonable charges [under the statute]. These economic factors made this case ideally suited to class action. Here, the aggregation of small claims, when joined as a class, becomes worthwhile to litigate. This economy of scale rationale underlying class actions has long been recognized by courts." *Id.* (citations omitted). Plaintiff's claims on behalf of medical record requestors in the action *sub judice* are similarly well-suited to class treatment, including, of course, reasons of judicial economy.

the claims of the class; and (4) the representative party will fairly and adequately protect the interests of the class (Petition at App. B at ¶11).

The petitioners argue that by allowing the class procedural device to be maintained in this action, they have been deprived of life, liberty, or property without due process of law in violation of the Fourteenth Amendment to the United States Constitution. Despite their acknowledgment that "standing" under Article III's "case or controversy" requirement does not control this state court action, the petitioners have nonetheless structured the instant petition around the proposition that the federal standing requirement should be construed to bar the West Virginia courts from assuming jurisdiction over the claims asserted in this action. In addition to the due process/standing argument, the petitioners contend that the West Virginia courts' application of *W.V.R.Civ.P.* 23's typicality requirement was erroneous and, again, invoke the due process clause as a basis for their request for this Court to review the decisions below.

D. Typicality/Class Standing

A class action requires a similarity of claims between the representative plaintiff and the class members. This relationship is assured by the typicality requirement set forth at *W.V.R.Civ.P.* 23(a)(3).

Under *W.V.R.Civ.P.* 23(a)(3), a party may sue or be sued as a representative if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The typicality requirement does not require an "identity" between a representative plaintiff's claims and the

claims of each class member. Instead, "typicality" requires only that the representative's claims be similar to and consistent with those of the other members of the class.

The state courts were certainly cognizant of the representative plaintiff's contention that he was overcharged for medical records in violation of *W.Va. Code*, 16-29-2 by the defendant, Weirton Medical Center, and its agent, the defendant, Recordex, but not the other defendants (Petition App. B at ¶14). In discussing the court's role in this situation the trial court observed that:

> "[i]n cases where several entities have engaged in parallel conduct that affects a class of persons in the same or a similar way, the question of whether a single plaintiff who has been affected by the conduct of one of the defendants can name all of those who engaged in the challenged conduct as defendants (even though such plaintiff had no contact with some of them) requires the court to determine whether plaintiff can demonstrate an interrelationship between the common conduct of multiple defendants and the action which he is pursuing." (Petition App. B at ¶14).

The petitioners argue that the representative plaintiff's claims against Weirton Medical Center and Recordex are not "typical" of the claims which other class members have against other defendant hospitals and copy companies. Thus, they claim class certification should be denied under *LaMar v. H & B Novelty and Loan Co.*, 489 F.2d 461 (9th Cir. 1973), where absence of typicality was found to prevent a plaintiff who had been harmed by one defendant from insti-

tuting a class action naming additional defendants who had not harmed plaintiff individually, but rather had engaged in similar conduct that had harmed others. *LaMar* was based on that court's determination that a plaintiff who has no individual cause of action against certain defendants may not fairly and adequately protect the interests of those who have such causes of action. The state courts in this action, however, were keenly aware of the rule of *LaMar* when considering the certification question below (Petition App. B at ¶14).

Indeed, the respondent's request for class certification in this matter was granted only after the trial court found that class treatment was consistent with the ruling articulated in *LaMar* (Petition App. B at ¶15, 16 and 17). In describing the scope of its holding, the *LaMar* court noted that:

> "Obviously, this position does not embrace situations in which all injuries are the result of a conspiracy or concerted schemes between the defendants at whose hands the class suffered injury. Nor is it intended to apply in instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious." *LaMar,* 489 F.2d at 465-66.

Hence, under the logic of *LaMar* such actions may be maintained in cases where the representative plaintiff has alleged a conspiracy or concerted action among all defendants and in cases where "all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious." *Id.* at 466. Although these exceptions to the general rule of *LaMar* were first articulated

as *dicta*, subsequent decisions have relied upon them as a guide for analyzing the propriety of class actions involving multiple defendants. Indeed, the West Virginia high court has adopted the approach suggested in *LaMar* for determining the propriety of class certification in cases dealing with multiple defendants in West Virginia. *See Erie v. Madden.*

1. Application of Conspiracy or Concerted Action Exception

When the alleged parallel conduct of multiple defendants is the result of a conspiracy, not only are all members of the conspiracy jointly liable, but such members may also be joined by a plaintiff as named defendants in a class action; and, so long as the other requirements of Rule 23 are met, such plaintiff may represent the class of all persons injured by the conspiracy, even though he can demonstrate no individual dealings with some of the defendants.

To the extent that the concerted action exception relates to an alleged conspiracy it is, in reality, not a true exception to the rule of *LaMar*, as an allegation of conspiracy states a direct claim against all conspirators irrespective of whether any particular conspirator had dealings with the representative plaintiff.[2] In any event, the concerted action exception was properly applied to the Rule 23(a)(3) typicality issue in certifying a plaintiff class in this case (Petition App. B at ¶15 - ¶16).

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2 Under a conspiracy theory, all conspirators may be held jointly and severally liable to the plaintiff regardless of whether they had any direct dealings with him.

In class actions involving buyers and sellers where plaintiffs allege a price-fixing conspiracy, class representatives who had not dealt with all of the defendants are routinely found to satisfy the typicality requirement for class certification on the basis that the representatives' claims are based on the same legal theories and factual allegations as those of the putative class members. *In re: Auction Houses Antitrust Litigation*, 193 F.R.D. 162 (D.C. N.Y. 2000); *In re: Industrial Diamonds Antitrust Litig.*, 167 FRD 374 (S.D.N.Y. 1996).

While it should be observed that, for purposes of determining class certification issues, the allegations of the amended complaint are taken as true and the merits of the claims are not examined, *Eisen v. Carlisle and Jacqueline*, 417 U.S. 156 (1974), evidence has been developed in support of the concerted conduct allegation in this case. In a separate action filed in Monongalia County, West Virginia, dealing with the production of medical records, petitioner, West Virginia University Hospital, took the position that for billing purposes there exists no distinction between itemized billing statements and medical records and that it is permissible for it to charge patients and authorized representatives 75¢ per page and a $10 search fee for itemized billing statements under *W.Va. Code,* 16-29-2. The financial services director for West Virginia University Hospital made it clear that the hospitals throughout this state have agreed to charge this maximum allowable rate with respect to itemized billing statements. Further, in that same case, the director of health information management for petitioner, West Virginia University Hospital, acknowledged that it was her understanding that: (1) the hospital or the copy company with whom it has

contracted could charge a maximum of 75¢ per page and a $10 search fee; (2) that such charges had been talked about at seminars she had attended; and (3) that charging the statutory maximum was the "general consensus in this state."

While the petitioners imply that the state courts relied upon the juridical link doctrine as the sole basis for the determination that Mr. Guida may proceed in the action below as the class representative, the certification order clearly states that "an examination of Plaintiff's Amended Complaint reveals allegations that the parallel conduct of the multiple defendants is the result of a conspiracy." Thus, the case was "found to fall within the concerted action exception to the rule of *LaMar*" (Petition App. B at ¶16). The state court's finding in this regard is well supported by the pleadings and the record adduced below.

2. Application of the Juridical Link Doctrine

Apart from the allegations of conspiracy and concerted action, the class in this action was also certified on the basis of the defendants' juridical relationship. The West Virginia court properly found that the defendants in this action are juridically related in a manner which suggests that a single resolution of this dispute would result in a far more expedient and economical use of judicial resources than the piecemeal litigation of each class member's individual claim, and that, accordingly, the action could be maintained as a class.

In cases where the representative plaintiff is able to show some specific connective link or relationship between the defendants' challenged conduct and the asserted claims, such plaintiff has established a juridical link, and, accordingly,

may proceed in a representative capacity under *W.V.R.Civ.P.* 23 against defendants with whom he has had no personal contact.

In an action involving a proposed class representative who has sued multiple defendants and who has had dealings with some of them (and therefore possesses individual threshold standing against such defendants), a West Virginia court is not required to apply an individual standing analysis with respect to the remaining defendants so long as the representative plaintiff can meet the *W.V.R.Civ.P.* 23 test of typicality by demonstrating that his claim is similar to and consistent with those of the class. In reaching the decision to permit this action to proceed as a class, the state courts were guided by the juridical links doctrine as adopted in West Virginia by the high court in *Erie v. Madden*.

However, unlike the insurance companies in *Erie v. Madden*, the state court found that in this matter the defendant hospitals fell within the express purview of the West Virginia statutes which form the basis of this action as they are all health care providers licensed, certified, or registered under the laws of West Virginia or agents of licensed, certified, or registered health care providers who have entered into contracts for the purpose of furnishing medical records to patients or their authorized representatives permitted to request medical records under *W.Va. Code, 16-29-1* (*See* Order Certifying Class at ¶17). The state court observed that:

> "unlike the challenged conduct of the insurance companies in *Erie*, the challenged conduct of the defendants in the action *sub judice* arises directly out of their status as licensed, certified, or regis-

> tered health care providers in West Virginia or their agency relationship with licensed, certified, or registered health care providers in West Virginia and their unique duty to furnish medical records in accordance with the terms of the statutes which are the subject of this action." (*See* Order Certifying Class at ¶17).

The state court further found that the:

> "statutory scheme pursuant to which this action is brought gives rise to a cohesiveness, connective link, or interrelationship between the defendants and the claims asserted in the Amended Complaint such as to support a finding that the defendants are juridically related in a manner that suggests a single resolution to this dispute is far preferable to a multiplicity of similar actions." (*See* Order Certifying Class at ¶17).

It is also noteworthy that - because the propriety of each class member's individual infant settlement was required to be determined on the basis of the specific facts and circumstances surrounding such settlement - the representative plaintiff in *Erie v. Madden* was not able to make a clear showing that she could meet the typicality requirement under *W.V.R.Civ.P.* 23(a)(3). This difficulty is not present in the matter at bar as the representative plaintiff's claim is virtually identical to the claims of all other class members.

Because the juridical link doctrine has developed as part of the typicality analysis under *W.V.R.Civ.P.* 23(a)(3), in a case where the representative plaintiff's claim against the

defendants with whom he has had dealings is undeniably typical of the claims which class members have against the defendants with whom the representative plaintiff has not had direct dealings, there is less reason for concern that the representative plaintiff may not "fairly and adequately protect the interests" of those who have direct claims.

Hence, because the representative plaintiff's claims are unquestionably "similar to and consistent with those of the other members of the class," and because the proposed representative plaintiff has demonstrated a specific connective link or relationship between the defendants' challenged conduct and the claims which he asserts in this case, it is clear that the state court's determination that the defendants are juridically related in a manner such that a single resolution of this dispute would be preferable to a multiplicity of similar actions does not impinge upon such defendant's right to due process and is in accord with well accepted principles of the law of class actions.

CONCLUSION

For all of the foregoing reasons, the respondent respectfully requests that this Honorable Court deny the petition.

Respectfully submitted,

Wray V. Voegelin, Esq.
Counsel of Record
Donald J. Tennant, Jr., Esq.
CASSIDY, MYERS, COGAN,
VOEGELIN & TENNANT, L.C.
The First State Capitol
1413 Eoff Street
Wheeling, WV 26003-3582
(304) 232-8100

Paul R.Cranston, Esq.
CRANSTON & EDWARDS, PLLC
Dorsey Avenue Professional Bldg
1200 Dorsey Avenue, Suite II
Morgantown, WV 26505
(304) 296-3500

Jacques R. Williams, Esq.
HAMSTEAD, HAMSTEAD
& WILLIAMS
231 Walnut Street
Morgantown, WV 26505
(304) 296-3636

David J. Sims, Esq.
Robert G. McCoid, Esq.
SIMS & MCCOID
1201 Main Street
Wheeling, West Virginia 26003
(304) 242-2000

Attorneys for Respondent,
David Guida

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No. 02-512

IN THE

Supreme Court of the United States

UNITED HOSPITAL CENTER *et al.*,

Petitioners,

v.

DANIEL GUIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of West Virginia

REPLY BRIEF OF PETITIONERS

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
MICHAEL D. HATCHER
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

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REPLY BRIEF OF PETITIONERS

In their opening brief, petitioners demonstrated that it violates a deeply rooted and fundamental principle of Anglo-American jurisprudence to permit a private plaintiff to maintain a class action against 68 private defendants despite his failure to allege that he has ever had any dealings with, or suffered any injury at the hands of, 67 of these defendants. Respondent offers no response to this showing. Indeed, he confirms the fundamental unfairness of such an action by urging the Court to ignore the plight of one petitioner on the grounds that its conduct is not similar to that of the only defendant with whom respondent actually dealt.

Unable to defend the propriety of this extraordinary action, respondent suggests that this Court lacks jurisdiction because the order on review is not final and rests on independent and adequate state law grounds. These claims are foreclosed by controlling authority. Because a Petition for a Writ of Prohibition is not an interlocutory appeal but a separate and original action in the West Virginia Supreme Court, the order disposing of that action is final and reviewable. And the state court's determination that respondent was entitled to maintain this action under state class action law was not an independent basis for the decision; instead, that state law ruling compelled the court to confront and decide petitioners' federal claim. Because petitioners squarely presented a due process challenge below, the order denying a writ of prohibition necessarily rests, in part, on the court's disposition of petitioners' federal law claim.

Respondent relies upon similar diversionary tactics in its arguments on the merits. Most notably, he mischaracterizes petitioners' due process claim as an attempt to mandate application of Article III to state courts. Petitioners, however, advocate no such principle. Indeed, they acknowledged that Article III does not apply to the state courts, which are free to

issue advisory opinions or adjudicate many types of claims that would not be justiciable in federal courts. Rather, petitioners seek recognition of the fundamental, and narrow, constitutional principle that a private defendant cannot be haled into court at the behest of a private plaintiff who alleges no injury caused by that defendant. None of the decisions of this Court that respondent cites even suggests, let alone holds, that state courts may entertain such suits.

Nor can respondent rebut petitioner's showing that, by dispensing with the "private injury" requirement, the state courts have caused the same fundamental unfairness that led to adoption of the "minimum contacts" test under the Due Process Clause. Respondent offers a lengthy recitation of the typicality and juridical links arguments that it advanced in the state courts. But none of these arguments demonstrates that petitioners had any reason to anticipate being sued by respondent, or that they were on notice that they should structure their primary conduct in order to protect themselves from such a suit. Indeed, respondent's opposition confirms that he has not alleged, and cannot allege, any "conspiracy" by petitioners, and that he seeks to predicate a suit against every health care provider in the state on nothing more than the existence of common practices among them.

1. Respondent's jurisdictional arguments are utterly baseless. A Petition for a Writ of Prohibition is not an interlocutory appeal from a lower court ruling, but a separate proceeding over which the West Virginia Supreme Court has original jurisdiction. W. Va. R. App. P. 14. Thus, when the West Virginia Supreme Court denied the Petition for a Writ of Prohibition, it rendered a final decision as to all issues raised in that proceeding, including petitioners' federal due process claim. The separate original proceeding before the West Virginia Supreme Court is therefore at an end, and that court's decision denying petitioners' due process claim is a "final judgment[]" from the "highest court" of West Virginia, as required by Section 1257(a). 28 U.S.C. § 1257(a).

The ongoing class action before the Circuit Court is separate and distinct from the now-concluded prohibition proceeding before the West Virginia Supreme Court, and does not affect the finality of the West Virginia Supreme Court's judgment. See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 289-90 (1980); see also *Board of Educ.* v. *Superior Court*, 448 U.S. 1343, 1346 (1980) (Rehnquist, J., in chambers) ("[T]he Board's petition for a writ of mandamus and/or prohibition was a distinct lawsuit which was fully and finally determined by the California Supreme Court's judgment. . . ."); *Fisher* v. *District Court*, 424 U.S. 382, 385 n.7 (1976) (per curiam) ("A judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final, even if further proceedings are to be had in the lower court."). Indeed, *World-Wide Volkswagen* is directly on point. There, this Court reviewed the denial of a writ of prohibition by the Oklahoma Supreme Court in which the petitioner had argued that federal due process concerns prevented an Oklahoma court from exercising personal jurisdiction over the petitioners. This Court reviewed the denial of the writ of prohibition – a ruling in a proceeding separate from the proceeding before the trial court, see Okla. Sup. Ct. R. 1.191 (noting that petition for writ of prohibition may be filed under original jurisdiction of Oklahoma Supreme Court) – despite the fact that the proceeding before the Oklahoma trial court was ongoing. *World-Wide Volkswagen*, 444 U.S. at 289-90.[1]

Nor is it true that the West Virginia Supreme Court's decision rested on adequate and independent state grounds. As petitioners have explained, and respondent nowhere disputes, petitioners argued below that permitting a class

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[1] Accordingly, the fact that some of the petitioners filed a motion to decertify the class in the Circuit Court could not have affected the finality of the order under review. In all events, since the filing of respondent's opposition, the Circuit Court denied that motion.

action plaintiff to sue private parties that are not alleged to have caused the plaintiff any injury violates the federal Due Process Clause. See Pet. for Writ of Prohibition at 9-10, 15-16. The West Virginia Supreme Court's determination that this action satisfies state law class action standards – including state law standards for determining typicality, class standing, or "juridical links" – did not resolve petitioners' federal claim. Rather, that determination required the West Virginia Supreme Court to confront petitioners' claim that, even if state law permits a suit such as this one, federal due process forbids state courts from entertaining such a suit.[2]

In order to deny the Petition for Writ of Prohibition, therefore, the West Virginia Supreme Court necessarily had to reject petitioners' federal due process claim. The fact that the court did not explicitly state that it was doing so, or explain its reasoning, is irrelevant. See *Raley* v. *Ohio*, 360 U.S. 423, 436-37 (1959). Because the federal claim was fairly presented and necessarily decided, this Court has jurisdiction to review the state court's order. See *id.*

2. Respondent's substantive arguments fare no better. Contrary to respondent's claim, petitioners do not seek a ruling that Article III applies to state court proceedings. Br. at 14-16. In fact, petitioners expressly acknowledged that state courts can and do entertain a variety of claims that would not be justiciable under Article III. See Pet. at 14-15. Rather, what petitioners seek is a ruling that state courts violate due process by allowing a private defendant to be

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[2] For these same reasons, respondent's reliance on this Court's decision in *Amchen Prods. Inc.* v. *Windsor*, 521 U.S. 591 (1997), is wholly misplaced. *See* Br. at 19. Petitioners agree that resolution of state law class action issues was "logically antecedent" to resolution of their due process claim; indeed, they urged the state court to resolve this case in their favor on state law grounds. In *Amchen*, of course, this Court concluded that the case could not be maintained as a class action and thus did not need to address the constitutional question. 521 U.S. at 622. Here, the opposite is true.

haled into court at the behest of a private plaintiff who alleges no injury caused by that defendant. As petitioners have shown (Pet. at 11-16), and respondent nowhere disputes, the requirement that a private plaintiff allege injury at the hands of a private defendant is a fundamental and deeply rooted principle of Anglo-American jurisprudence that long predates adoption of the federal constitution and has, until recently, been consistently respected by state as well as federal courts. Because this "private injury" requirement is essential to the "'orderly administration of the laws,'" and gives our legal system the "degree of predictability" necessary to ensure "'fair play and substantial justice,'" *World-Wide Volkswagen Corp.*, 444 U.S. at 292, 297, the Due Process Clause requires state courts to adhere to this fundamental requirement.

To be sure, this same requirement is incorporated into Article III's "case" or "controversy" requirement, just as several other fundamental due process principles are incorporated into other express provisions of the Constitution. Cf. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994) (noting that the Takings, Contracts and Ex Post Facto Clauses all embody fundamental due process principles). But Article III encompasses a number of other limitations on the judicial power, derived from separation of powers principles and "founded in concern about the proper – and properly limited – role of the courts in a democratic society," *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). These include the requirements of injury in suits involving public defendants, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), a threat of real and immediate injury in suits seeking injunctive relief, *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-02 (1983), and a showing that the plaintiff will benefit from any relief sought. *Warth*, 422 U.S. at 508. Petitioners do not contend that any of these limitations are fundamental components of due process, and thus do not seek to subject state courts to the restrictions of Article III per se.

Given the more than 800-year pedigree of the "private injury" requirement, it is unsurprising that respondent identifies no case in which this Court has ever suggested, let alone ruled, that state courts may permit a private defendant to be haled into court at the behest of a private plaintiff who alleges no cognizable injury caused by that defendant. In the cases respondent cites, this Court noted that state courts can hear challenges to laws of general application, *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 617 (1989), render advisory opinions on the constitutionality of state laws, *Pennell* v. *City of San Jose*, 485 U.S. 1, 8 (1988); *Secretary* v. *J.H. Munson Co.*, 467 U.S. 947, 971 (1984) (Stevens, J., concurring), entertain challenges to state laws brought by taxpayers, *Doremus* v. *Board of Education*, 342 U.S. 429, 433-34 (1952), and "use injunctions to oversee the conduct of law enforcement authorities" despite the lack of a real and immediate threat of future injury, *Lyons*, 461 U.S. at 113.[3] None of these cases involved claims brought by a private plaintiff against a private defendant who was not alleged to have caused the plaintiff any injury. Accordingly, there is no "well-settled (and well grounded) precedent" of this Court establishing that States may dispense with the fundamental requirement of an allegation of injury at the hands of a private defendant.

Nor does respondent rebut petitioners' showing that dispensing with this requirement is profoundly unfair. He asks the Court to ignore the plight of petitioner Webster Memorial Hospital on the grounds that its billing practices "are not representative." Br. at 4. But it is precisely because the state courts dispensed with the requirement of actual injury at the hands of a private defendant that respondent is

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[3] These cases involved well-recognized non-Article III types of state court adjudications (*see* Pet. at 14-15), all of which have historical antecedents that predate the federal constitution itself. *See* R. Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement*, 78 Yale L.J. 816 (1969).

able to maintain suit against an entity whose practices are unlike those of the hospital with whom he actually dealt. Indeed, by allowing him to maintain suit against literally dozens of entities with whom he has never dealt, the state courts have afforded respondent enormous, and entirely improper, leverage that he can use to extract a settlement without ever alleging, let alone proving, injury at the hands of petitioners.

Respondent's contention that this unfairness does not implicate the due process concerns that led to this Court's adoption of the "minimum contacts" test, Br. at 14-15, is simply wrong. In *World-Wide Volkswagen Corp.*, this Court stressed that what is "critical to the due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." 444 U.S. at 297.[4] The Court noted, moreover, that predictable legal rules governing amenability to suit "allow[] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.* Here, permitting plaintiff to sue Webster Memorial and all of the other petitioners with whom he has never dealt is unfair precisely because these petitioners could not reasonably have anticipated being sued by him, and they had no reason to structure their primary conduct in order to protect themselves against such a suit.

3. Respondent's reliance on the "juridical links" doctrine serves only to underscore the impropriety of the decision

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[4] In light of the Court's emphasis on due process and the requirements of "'fair play and substantial justice,'" 444 U.S. at 292, respondent's suggestion that the "minimum contacts" test involves "issues of federalism," not due process, Br. at 14, is baseless. Indeed, in *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), the Court explained that jurisdictional restrictions based on state sovereign power "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause." *Id.* at 702 n.10.

below. Respondent quotes at length from the lower court, which found that petitioners are juridically linked because of their "'unique duty,'" as "'licensed, certified, or registered health care providers in West Virginia,'" to "'furnish medical records,'" and because the statutory scheme "'gives rise to a cohesiveness, connective link, or interrelationship between the defendants and the claims asserted.'" Br. at 28. But these "findings" in no way demonstrate that it is fair or proper to dispense with the fundamental requirement that a private plaintiff allege harm at the hands of the private defendants he has sued. West Virginia's medical records statute gave petitioners no reason to anticipate being sued by persons with whom they have never dealt, nor any reason to structure their primary conduct in order to protect themselves against such suits. Indeed, the circumstances of petitioner Webster Memorial Hospital more than refute any suggestion that common regulation obviates the due process problems that arise when a private plaintiff is permitted to sue a private defendant with whom the plaintiff has never dealt. The lower courts' contrary conclusion conflicts with decisions of state and federal courts that have rejected just this argument. *Streich* v. *American Family Mut. Ins. Co.*, 399 N.W.2d 210, 216 (Minn. Ct. App. 1987); *Angel Music, Inc.* v. *ABC Sports, Inc.*, 112 F.R.D. 70, 72 (S.D.N.Y. 1986).

Nor does respondent's bald – and economically non-sensical – allegation of a conspiracy obviate the due process violation that maintenance of this suit entails. In fact, respondent admits that, after roughly a year of discovery, he has adduced no evidence of any conspiracy to fix prices, and instead relies on testimony concerning a "'general consensus'" to charge 75 cents per page. Br. at 25-26.[5] A

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[5] Respondent's statement that the financial services director for one petitioner "made it clear that the hospitals throughout the state have agreed to charge this maximum allowable rate," Br. at 25, is plainly false. This person stated that "[t]hat's sort of a common practice," but acknowledged that "I have not seen other hospitals' policies and

consensus is simply not a conspiracy, particularly where, as here, the alleged "conspirators" do not compete with one another in the provision of patient medical records, and thus have absolutely no reason to fix the prices they charge for those records. Indeed, it is because there is no competition that prices are regulated by the state statute.

4. Finally, there is no reason to defer plenary consideration of the important issue that this case raises. The West Virginia Supreme Court has become the second state supreme court to dispense with the "private injury" requirement and to permit a plaintiff to sue a private defendant with whom the plaintiff has never dealt. See *Weld* v. *Glaxo Wellcome Inc.*, 746 N.E.2d 522, 530-31 (Mass. 2001) (permitting plaintiff to sue, under "juridical links" doctrine, companies with whom he had never dealt). As petitioners have explained, class counsel have aggressively pursued similar actions against entire industries based on the same flawed theory of common regulation that the lower courts accepted in this case. Pet. at 22. The decision in this case and the reasoning in *Weld* provide a green light for future actions against private defendants unfairly haled into court by plaintiffs who can allege no injury at the hands of the defendants.

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procedures here in West Virginia." (McFadden Dep. at 93, in App. to Resp't, Danial J. Guida's Resp. to Hospital's Pet. for Writ of Prohibition.)

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
MICHAEL D. HATCHER
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

November 12, 2002

* Counsel of Record

SUPPLEMENTAL RULE 29.6 STATEMENTS

The following Rule 29.6 statements supplement the statements contained in the Petition for a Writ of Certiorari previously filed in this case. With the Rule 29.6 statements below, all Petitioners have now filed a Rule 29.6 statement.

Petitioners Broadus Hospital and Princeton Community Hospital Assoc., Inc. are not non-governmental corporations.

Petitioners Cabell Huntington Hospital, Community Health Association d/b/a Jackson General Hospital and Eye and Ear Clinic of Charleston are non-governmental corporations with no parent companies. No publicly-traded corporation owns 10% or more of any of these petitioners.

Petitioner Braxton County Memorial Hospital, Inc. is a non-governmental corporation with parent company Charleston Area Medical Center Health Systems, Inc. No publicly traded corporation owns 10% or more of this petitioner.

Petitioner Charleston Area Medical Center, Inc. is a non-governmental corporation with parent company Charleston Area Medical Center Health Systems, Inc. No publicly traded corporation owns 10% or more of this petitioner.

Petitioner Davis Memorial Hospital is a non-governmental corporation with parent company Davis Health System. No publicly traded corporation owns 10% or more of this petitioner.

Petitioner Greenbrier Valley Medical Center, LLC is a non-governmental corporation with parent companies Triad Holdings III, Inc., Triad Holdings II, LLC, and Triad Hospitals, Inc. Triad Hospitals, Inc. is a publicly traded corporation that owns 10% or more of this petitioner.

Petitioner Montgomery General Hospital is a non-governmental corporation with parent company Montgomery

General Healthcare Systems, Inc. No publicly traded corporation owns 10% or more of this petitioner.

Petitioner Plateau Medical Center, Inc. is a non-governmental corporation with parent companies Heritage Health Systems, Inc. and Charleston Area Medical Center Health Systems, Inc. No publicly traded corporation owns 10% or more of this petitioner.

Petitioner Preston Memorial Hospital is a non-governmental corporation with parent company Preston Healthcare Corp. No publicly traded corporation owns 10% or more of this petitioner.

Petitioners Rehabilitation Hospital Corporation of America, d/b/a Healthsouth Western Hills, Rehabilitation Hospital Corporation of America, d/b/a Healthsouth Southern Hills, and West Virginia Rehabilitation Hospital, Inc., d/b/a Healthsouth Mountain View are all non-governmental corporations with the ultimate parent corporation Healthsouth Corp. FMR Corp., as parent company of various Fidelity mutual funds, reported as of December 31, 2001, that various Fidelity mutual funds beneficially owned more than 10% of Healthsouth Corp.'s common stock. Healthsouth Corp. is unaware of the current holdings of FMR Corp. and its affiliates. Healthsouth Corp. has not received notice of any other holders of more than 10% of Healthsouth Corp.'s common stock.

Petitioner St. Mary's Medical Center, Inc. is a non-governmental corporation with parent company Pallottine Health Services, Inc. No publicly traded corporation owns 10% or more of this petitioner.

Petitioner The Charles Town General Hospital, d/b/a Jefferson Memorial Hospital is a non-governmental corporation with parent company Jefferson Regional Health System, Inc. No publicly traded corporation owns 10% or more of this petitioner.